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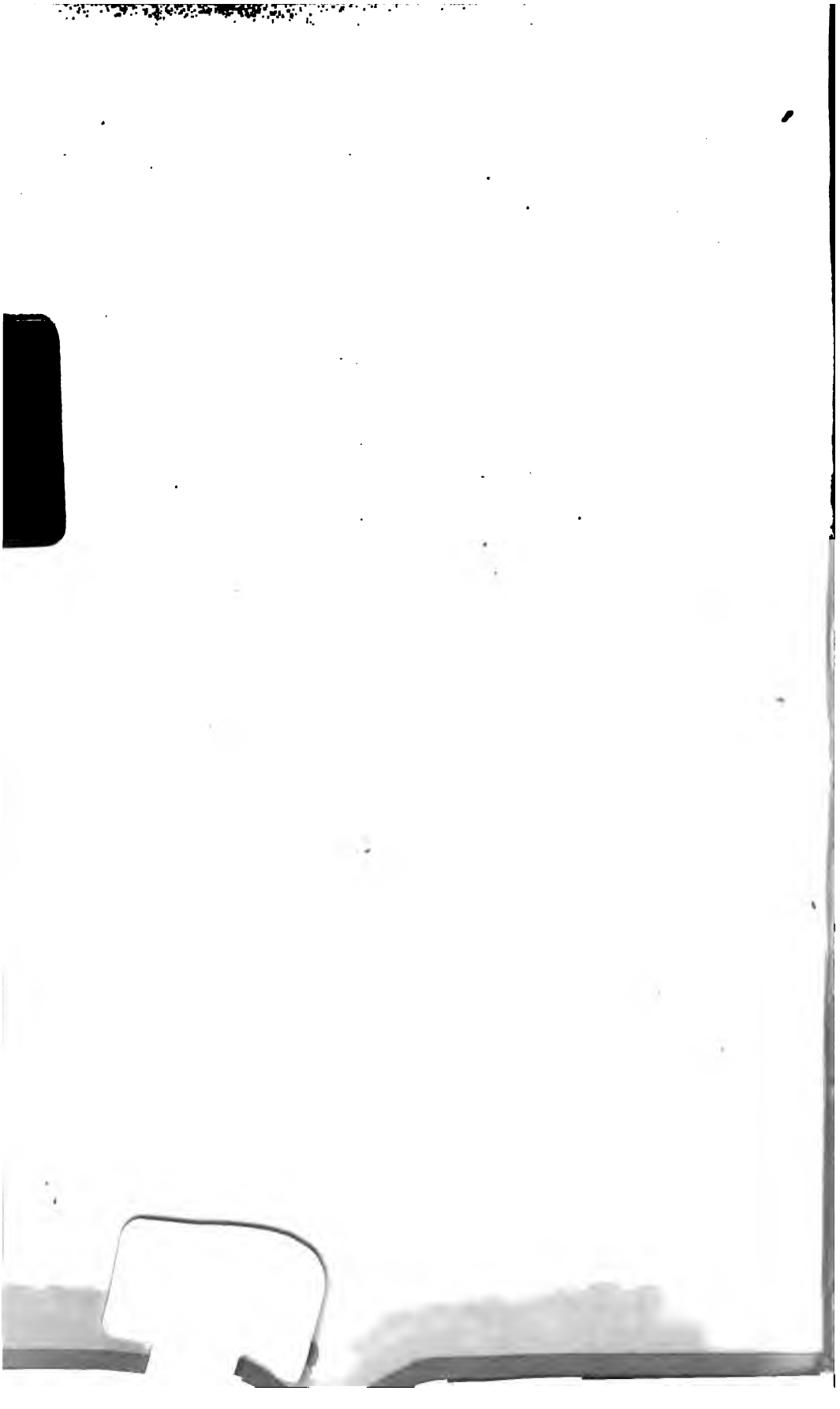
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A TREATISE

ON

THE LAW OF BANKRUPTCY.

A

TREATISE

ON THE

LAW OF BANKRUPTCY.

BY

JOHN LOWELL, LL.D.,

JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR MASSACHUSETTS, 1865–1878, AND OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE FIRST CIRCUIT, 1879–1884,

AND

JAMES ARNOLD LOWELL,

OF THE SUFFOLK BAR.

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TO

MRS. JOHN LOWELL

This Book,

THE RESULT OF MANY YEARS' LABOR OF HER HUSBAND

AND HER SON,

IS AFFECTIONATELY DEDICATED.

PREFACE.

My father was engaged for many years before his death, in May, 1897, in the preparation of a treatise on bankruptcy. His intention was to publish the work when Congress passed a bankrupt act. This, however, did not occur in his lifetime.

In the following pages, Part One is the work of my father, without any alteration whatever in the text, but with the addition by me of recent cases and many footnotes; the latter are contained in brackets to distinguish them. It will be noticed that in this part of the book, the word "assignee" is almost always used in designating the officer now called the trustee. Part Two of the book, which relates to the Act of 1898, represents my contribution to the work.

The index of a treatise which is intended for a practical book is a very important thing. Therefore, I have endeavored in this instance to make the Index at once exhaustive and convenient. To this end, I have entered every subject under several different heads, so that from whatever side it be sought, it may be found.

I desire especially to express my thanks to Robert Homans, Esq., of the Suffolk Bar, for help in the collection of recent cases under the insolvent laws of the several states.

I have been assisted in the very arduous labor of correcting the proof and tabulating the cases by my wife, without whose constant aid and encouragement the work would never have been accomplished.

JAMES ARNOLD LOWELL.

Boston, September 1, 1899.

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LAW OF BANKRUPTCY.

PART I.

CHAPTER I.

CONSTITUTIONAL LAW — POWER OF THE STATES.

§ 1. **Bankrupt Laws.** — The Congress of the United States is expressly invested with power to "establish uniform laws on the subject of bankruptcies throughout the United States."[1] By some advocates of a strict construction of the Constitution it was maintained that this article only gave Congress authority to pass such a law as would, at the time the Constitution was adopted, have been known as a bankrupt law in England as distinguished from an insolvent law. It was said that the States might pass insolvent laws and the United States bankrupt laws; but the extreme difficulty of drawing the line between such laws was pointed out by Marshall, C. J., in the first case which involved the question of the powers of the States;[2] and it is now settled that the power of Congress over the general subject of insolvent debtors is limited only by the requirement of uniformity.[3]

§ 2. **Persons not Traders; Voluntary Petitions.** — It is now settled that all insolvent debtors, whether traders or not, may

[1] Const., Art. I., § 8, cl. 4.

[2] Sturges *v.* Crowninshield, 4 Wheat. 122, 193 *et seq.*

[3] Besides the cases cited below, see Story, Constitution, 5th ed., § 1104 *et seq.*; Pomeroy, Constitutional Law, 9th ed., § 391 *et seq.*

be made subject to a federal bankrupt law;[1] that the debtor himself may be authorized to apply for its benefits;[2] that a law which provides no discharge of contracts is constitutional;[3] and that a method of discharge by composition may be provided,[4] notwithstanding that the bankrupt law of England in 1787 possessed none of these features. Two of these provisions are found in the act of 1841, and all three in that of 1867, as amended in 1874; and there is but a single reported case, which was reversed by the appellate court,[5] and two dissenting opinions by a single judge,[6] which are opposed to these conclusions. The enormous number of cases in which no question was raised take for granted the constitutionality of such laws.

§ 3. **Uniformity.** — The constitutional grant to pass uniform laws implies that a law which is not uniform will not be constitutional. The uniformity is to be territorial "throughout the United States." The point has been taken in argument that there must be a uniformity in the treatment of all bankrupts, so that no distinction can be made between traders and non-traders, or between natural persons and corporations; but no decision can be found to sustain this argument, and such discriminations have been made and silently sustained in the acts of 1841 and 1867.

§ 4. **Uniformity as applied to Exemptions.** — The bankrupt law of 1867 exempted from the operation of the assignment such property of the debtor as was exempted from legal process by the law of his residence not exceeding the amount allowed in the several States in the year 1864. The laws of the several States were widely different from each other in the char-

[1] Klein's Case, 1 How. 277, note; Kunzler *v.* Kohaus, 5 Hill, 317; McCormick *v.* Pickering, 4 N. Y. 276; Re Silverman, 1 Sawyer, 410, Fed. Cas. No. 12,855.

[2] Thompson *v.* Alger, 12 Met. 428; Keene *v.* Mould, 16 Ohio, 12; Rowan *v.* Holcomb, 16 Ohio, 463; Loud *v.* Pierce, 25 Me. 233; Cutter *v.* Folsom, 17 N. H. 139; State Bank *v.* Wilborn, 1 Eng. (Ark.) 35; Lalor *v.* Wattles, 3 Gilman, 225.

[3] Re Cal. Pac. R. R. Co., 3 Sawyer, 240, Fed. Cas. No. 2315.

[4] Re Reiman, 7 Ben. 455, Fed. Cas. No. 11,673; affirmed, 7 Ben. 562, Fed. Cas. No. 11,675.

[5] Re Klein, 2 N. Y. Leg. Obs. 185, Fed. Cas. No. 7866; reversed, s. c. 1 How. 277, note.

[6] In Sackett *v.* Andross, 5 Hill, 327; McCormick *v.* Pickering, 4 N. Y. 276.

acter and amount of their exemptions. It was held, however, that the different effect which was given to assignments in different States by reason of the differing exemptions did not make the law unconstitutional.[1] In 1870 the State of Virginia provided for much larger exemptions than had before obtained in that State. Congress in the year 1872 adopted by a general law the existing exemptions of the several States. The law of Virginia and some similar laws in other States were pronounced unconstitutional in their application to antecedent debts.[2] Then Congress passed an act purporting to give a construction to the act of 1872, and providing that the exemptions allowed by the constitutions and laws of the States respectively should be valid against debts contracted before the passage of such constitutions and laws, and against liens and judgments or decrees of any State court.[3] Chief Justice Waite and several other judges held that this law was unconstitutional,[4] while Judge Woods and several other judges held otherwise.[5] The point has not been decided by the Supreme Court. The Chief Justice admitted *arguendo* the constitutionality of the act of 1867, upon the ground that by adopting the valid laws of the States it gave to creditors everything which they could have made available for the enforcement of their claims by any legal process; but held that when this principle was abandoned the operation of the law ceased to be uniform, because Congress undertook by its own authority to exempt in certain States property which could not lawfully be exempted in those States, and which was not exempted in others.[6]

[1] Re Appold, 1 N. B. R. 621, Fed. Cas. No. 499; Re Beckerford, 1 Dillon, 45, Fed. Cas. No. 1209; Re Jordan, 8 N. B. R. 180, Fed. Cas. No. 7514.

[2] The Homestead Cases, 22 Gratt. 266; Jones *v.* Brandon, 48 Ga. 593; Gunn *v.* Barry, 15 Wall. 610.

[3] See, for the history of these enactments, Darling *v.* Berry, 13 Fed. Rep. 659.

[4] Re Deckert, 10 N. B. R. 1, Fed. Cas. No. 3728; Re Dillard, 9 N. B. R. 8, Fed. Cas. No. 3912; Re Kerr, 9 N. B. R. 566, Fed. Cas. No. 7729; Re Duerson, 13 N. B. R. 183, Fed. Cas. No. 4117; Re Shipman, 14 N. B. R. 570, Fed. Cas. No. 12,791; Bush *v.* Lester, 55 Ga. 579.

[5] Re Smith, 2 Woods, 458, Fed. Cas. No. 12,996; Re Kean, 8 N. B. R. 367, Fed. Cas. No. 7630; Re Jordan, 8 N. B. R. 180, Fed. Cas. No. 7514; Re Everitt, 9 N. B. R. 90, Fed. Cas. No. 4579; Re Jordan, 10 N. B. R. 427, Fed. Cas. No. 7515; Darling *v.* Berry, 13 Fed. Rep. 659.

[6] Re Deckert, 10 N. B. R. 1, Fed. Cas. No. 3728.

The argument on the other side may be given by some extracts from the opinion of Love, J.:[1] "In my opinion, when a bankrupt, revenue, or naturalization law is made by its terms applicable alike to all the States of the Union without distinction or discrimination, it cannot be successfully questioned on the ground that it is not uniform, in the sense of the Constitution, merely because its operation or working may be wholly different in one State from another. The circumstances and conditions existing in the States of the Union are infinitely various. No law which human ingenuity could possibly frame would be uniform in the sense of operating equally or alike in the various States, with their different conditions and diversified interests." This he illustrates in several ways. He then maintains that the law of 1867, though wholly just to creditors, for the reason given by the Chief Justice, does not, in fact, operate uniformly; and concludes that the new law, being impartial in its terms, is valid.

§ 5. **Uniformity of Construction.** — It was suggested in an argument of some length by a learned Chief Justice that the statute of 1841 was not uniform, because the mode of administration was summary, and there was no appeal to the Supreme Court upon many difficult questions of interpretation which were raised and might be decided diversely in the lower courts.[2] This singular suggestion that a statute is not uniform if any of its terms are capable of two constructions, is not noticed in later cases; and the court in which it was made, soon after pronounced the law constitutional.[3]

§ 6. **Criminal Sanctions; United States v. Fox.** — Congress has undoubted power to provide criminal sanctions as part of a bankrupt law.[4] But that section of the act of 1867 which punished a person who, within three months before he became bankrupt, should obtain credit under the false color and pretence of carrying on business, with intent to defraud, was held to be beyond the power of Congress; because there was

[1] Darling *v.* Berry, 13 Fed. Rep. 659, 667.

[2] Kittredge *v.* Warren, 14 N. H. 509, 511, per *Parker, C. J.*

[3] Cutter *v.* Folsom, 17 N. H. 139.

[4] United States *v.* Fox, 95 U. S. 670, 672, per *Field, J.*

no reference in this clause of the law to an intent to become bankrupt, or in any way to affect creditors or the debtor in respect to a possible future bankruptcy. It was, therefore, an attempt to make that an offence against the United States, in a future contingency, which was not one when it was committed.[1]

§ 7. **Power of Congress not exclusive.** — It was early held, in opposition to the opinion of some eminent judges, that the grant to Congress to pass bankrupt laws is not exclusive of a similar power in the States when Congress has not acted.[2] Neither is the power concurrent; for when Congress has acted, the State laws, so far as they cover the same ground, are suspended.[3]

The first general law on the subject regulated this matter;[4] but in later statutes this has not been thought necessary.

§ 8. **What Laws not suspended.** — It will be convenient to examine first what laws or parts of laws are not suspended. If certain classes of cases which might be included in a bankrupt law are purposely left untouched, the local laws may continue to deal with them. Such are cases under the poor debtor laws of the several States; for the bankrupt laws since 1800 have not attempted to deal with poor debtors, as such.[5] So with persons whose total debts are less than the minimum required to give jurisdiction to the federal court.[6] So with

[1] United States *v.* Fox, 95 U. S. 670. See United States *v.* Clark, 1 Lowell, 402, Fed. Cas. No. 14,806. The former case overrules United States *v.* Pusey, 6 N. B. R. 284, Fed. Cas. No. 16,098.

[2] See Story, Const., 5th ed., § 1114; Sturges *v.* Crowninshield, 4 Wheat. 122; Ogden *v.* Saunders, 12 Wheat. 213; Clay *v.* Smith, 3 Pet. 411; Mather *v.* Bush, 16 Johns. 233.

[3] See cases in notes *infra* and *dicta* in Sturges *v.* Crowninshield, 4 Wheat. 122; May *v.* Breed, 7 Cush. 15, at 40; Clarke *v.* Rosenda, 5 Rob. (La.) 27; Klein's Case, 1 How. 277, note.

[4] Stat. 4 April, 1800, § 61, 2 Stats. 36.

[5] Jordan *v.* Hall, 9 R. I. 218; Steelman *v.* Mattix, 36 N. J. 344.

[6] Stat. 4 April, 1800, § 61, 2 Stat. 36; Shepardson's Appeal, 36 Conn. 23; Carter *v.* Sibley, 4 Met. 298, per *Shaw, C. J.*; Tobin *v.* Trump, 7 Phila. 123, per *Thayer, J.* [These cases seem inconsistent with those cited below. They do not apply to the act of 1898, which allows all debtors to file voluntary petitions, but extends the privileges of the bankrupt law to those creditors only who can prove that their debtor owes at least $1000. § 4, a & b. It is clear that Congress intended to cover the whole ground, and to refuse proceedings against the debtor who owed less than $1000.]

the estates of persons who have died insolvent before action has been taken in bankruptcy.[1] So of certain classes of corporations omitted from the operation of the bankrupt law.

§ 9. **What Laws suspended.** — On the other hand, complete systems of bankruptcy, worked out through the courts, like those of Massachusetts, Maryland, California, Louisiana, and some other States, are held, by a great preponderance of authority, to be wholly suspended.[2] Decisions in Connecticut, Kentucky, and North Carolina appear to hold that if the law in question is like the law of Congress, in its general scope, as most State laws are, since they meet the same needs by substantially similar remedies, it may be availed of in any particular case in which the courts of the United States have not been applied to; or even when they cannot be applied to because the State law furnishes more acts of bankruptcy, or gives a longer time in which to file a petition.[3] If this is the true meaning of those decisions, they are not sound. The question is not of harmony between two systems, but of a paramount authority establishing one of them. The States have no power to declare certain things to be acts of bankruptcy by persons included within the scope of the law of the United States, which Congress has not chosen to make such; nor to extend the time within which creditors may file a petition. It is held by all the courts that a discharge granted under a State law will be void, while an act of Congress is in force.[4] The same argument will invalidate an adjudication of bankruptcy made

[1] Durgin *v.* Coolidge, 3 Allen, 554; Frazer *v.* McDonald, 8 N. B. R. 237, Fed. Cas. No. 5073; Adams *v.* Terrell, 4 Fed. Rep. 796.

[2] Ex parte Eames, 2 Story R. 322; Fed. Cas. No. 4237; Griswold *v.* Pratt, 9 Met. 16; Van Nostrand *v.* Carr, 30 Md. 128; Larrabee *v.* Talbott, 5 Gill, 426; Cassard *v.* Kroner, 4 N. B. R. 569; Re Reynolds, 8 R. I. 485; Barber *v.* Rodgers, 71 Penn. St. 362; Nesbit *v.* Greaves, 6 Watts & S. 120; Martin *v.* Berry, 37 Cal. 208; Fisk *v.* Montgomery, 21 La. An. 446. See Shryock *v.* Bashore, 13 N. B. R. 481, for an able review of the doctrine, though the decision was wrong; s. c. on appeal, 15 N. B. R. 283, 82 Penn. St. 159; Sadler *v.* Immel, 15 Nev. 265.

[3] Geery's Appeal, 43 Conn. 289; Ebersole *v.* Adams, 10 Bush, 83; Linthicum *v.* Fenley, 11 Bush, 131; Ziegenfuss' Case, 2 Iredell, 463.

[4] Com. *v.* O'Hara, 6 Phila. 402; Tobin *v.* Trump, 7 Phila. 123; Chamberlain *v.* Perkins, 51 N. H. 336; Rowe *v.* Page, 54 N. H. 190; Lyman *v.* Bond, 130 Mass. 291; Shears *v.* Solhinger, 10 Abb. Pr. N. S. 287; Re Jacobs, 12 Abb. Pr. N. S. 273.

by such a court. That the general law, if availed of, is paramount, all admit. The inconvenience and confusion which would arise if the supreme authority were supposed to be dormant until called into action in a particular case, is forcibly shown in several able opinions.[1]

§ 10. **Assignment Laws of State.** — As to the assignment laws of certain of the States, some distinctions are to be noted. If they are mere systems of insolvency, they will be suspended; as the assignment law of Massachusetts of 1836 was impliedly repealed by the insolvent law of 1838.[2] But the common-law power of assignment remains to an insolvent debtor as against attaching or levying creditors, and can only be avoided by a trustee in bankruptcy, duly appointed within the time required by the statutes.[3] It follows that a law which merely aids and regulates such assignments is not wholly suspended;[4] though such parts of it as are inconsistent with the paramount law, such as a forced discharge, will be.[4]

There are statutes in several States which require that when an assignment of a debtor's whole property is made, for the benefit of some of his creditors, it shall inure to the benefit of all. Whether such a law is suspended would seem to depend upon whether it is merely a regulation of the right of assignment, or a system of bankruptcy applied to a particular class of cases.

§ 11. **Corporations; Partnerships.** — Notwithstanding many *dicta* of great weight,[5] it must be conceded that the States, which create corporations, have the power to deal with their dissolution. Thus, as it were incidentally, they retain authority to wind up corporations which are actually insolvent; not because they are insolvent, but because, being insolvent, the State can insist that they shall not continue to impose on the

[1] Griswold *v.* Pratt, 9 Met. 16, at 20, per *Dewey, J.*; Tobin *v.* Trump, 7 Phila. 123, per *Thayer, J.*

[2] Wyles *v.* Beals, 1 Gray, 233. See Chamberlain *v.* Perkins, 51 N. H. 336; Rowe *v.* Page, 54 N. H. 190.

[3] *Infra*, § 85.

[4] Mayer *v.* Hellman, 91 U. S. 496; Boese *v.* King, 108 U. S. 379; Cook *v.* Rogers, 31 Mich. 391; Maltbie *v.* Hotchkiss, 38 Conn. 80; Hawkins's Appeal, 34 Conn. 548; Beck *v.* Parker, 65 Penn. St. 262; Proctor's Trs. *v.* Wadesworth, 3 B. Mon. 401.

[5] Morawetz, 2d ed., §§ 1047, 1048.

public.[1] But a statute of a State which applies only to insolvent corporations, like one of the laws of Massachusetts,[2] would be suspended as to such corporations as are subject to the law of Congress.[3] Upon the general subject it may be noted that the statute of Massachusetts was never held to supersede the jurisdiction of the courts of that State to wind up insolvent corporations.

Similar considerations apply, to a certain extent, to partnerships. Before the court of bankruptcy has acted, the State court must have power to interpose in certain cases of disputes between partners, notwithstanding the firm and the partners may be found to be insolvent.

§ 12. **Acts otherwise valid may be Acts of Bankruptcy.** — It must not be forgotten that acts done under a valid State law may yet be acts of bankruptcy, which will authorize creditors to petition for adjudication. This is the necessary result of the proposition, which is established by authorities cited in a later part of this work, that conveyances perfectly valid between the parties, and not fraudulent in the ordinary sense, are yet constructively fraudulent when assailed within a certain time, if they interfere with the operation of the system established by the bankrupt law.[4] It follows that certain decisions are unsound which hold that because a law regulating assignments is not suspended, trustees in bankruptcy appointed under a petition filed within the time required for setting aside technical frauds cannot avoid them.[5]

Equally unsound are the decisions that an assignment by the debtor to the creditor to escape imprisonment, as required by a poor debtor law, is not a preference.

§ 13. **At what Time Suspension takes effect.** — The bankrupt laws have usually provided that they should not go into full operation, so as to be available for proceedings by or

[1] See Irons *v.* Manuf. Nat. Bank, 6 Biss. 301, Fed. Cas. No. 7068; Wright *v.* Merchts. Nat. Bank, 1 Flippin, 568, Fed. Cas. No. 18,084.

[2] Pub. Sts. Mass., c. 157, §§ 127 to 136 inc.

[3] French *v.* O'Brien, 52 How. Pr. 394.

[4] *Infra*, §§ 62, 85.

[5] Von Hein *v.* Elkus, 15 N. B. R. 194, 15 N. Y. Supr. Ct. R. 516; Haas *v.* O'Brien, 66 N. Y. 597.

against the subjects of them, until a certain time after their enactment. This is done to give opportunity for the appointment of the necessary officers and other preparations for the effectual working of the act. It is settled that the State laws are not suspended until the general law can be actually availed of. If it were not so, there would be a period during which no remedy could be had in cases of bankruptcy; and, of course, cases duly begun under the law of the State may be proceeded with and finished after the general law has become effectual.[1]

§ 14. **Meaning of Suspension.** — The suspension of the laws of the State means merely that their operation is interfered with by the paramount authority of the act of Congress. They continue to govern the rights of debtors and creditors within the State, subject to the condition subsequent, that the bankrupt law shall be repealed; and so of a State law passed while the bankrupt law is in force. Upon such repeal, the law of the State at once becomes operative, without further legislation; and a debtor may be proceeded against under the State law, or a discharge under that law may be defeated, for acts done during the existence of a general bankrupt law. So an attachment may be dissolved or a contract discharged when the suspended law revives, though, if it were a wholly new law, antecedent debts and liens could not be affected by it consistently with the Constitution of the United States.[2]

[1] Judd *v.* Ives, 4 Met. 401; Day *v.* Bardwell, 97 Mass. 246; Re Horton, 5 Law Reporter, 462, Fed. Cas. No. 6708; Meekins *v.* Creditors, 19 La. An. 497 and cases; Martin *v.* Berry, 37 Cal. 208; Chamberlain *v.* Perkins, 51 N. H. 336. [These decisions have no application to the act of 1898, which contains a clause, absent from the former acts, providing that "Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it." This denies by implication the validity of all proceedings under State laws begun after the passage of the act. Parmenter Mfg. Co. *v.* Hamilton, 51 N. E. Rep. 529 (Supreme Court, Mass.).]

[2] Atkins *v.* Spear, 8 Met. 490; Lothrop *v.* Highland Foundry, 128 Mass. 120; Damon's Appeal, 70 Maine, 153; Baldwin *v.* Buswell, 52 Vt. 57; Ward *v.* Proctor, 7 Met. 318; Austin *v.* Caverly, 10 Met. 332; Orr *v.* Lisso, 33 La. An. 476; Tua *v.* Carriere, 117 U. S. 201.

CHAPTER II.

PERSONS SUBJECT TO BANKRUPTCY.

§ 15. **Married Women.** — Persons who cannot contract debts are of course not within the scope of the act. Married women, until their disabilities were removed by comparatively recent statutes, could not, in general, be made bankrupt, as, for instance, for debts contracted before marriage;[1] though if a married woman survived her husband such debts, if still subsisting, were sufficient for the purposes of a petition.[2] Until corrected by statute, it was held that a married woman, imprisoned on execution with her husband, could not take the benefit of the insolvent law.[3] In this state of the law a practice grew up of discharging the wife on motion in the court from which the execution issued, unless she had separate property which she might devote to the payment of the debt.[4]

If, by usage or statute, a married woman may contract debts as if she were *sole*, she may become or be made a bankrupt; as, for instance, a *feme covert*, trading according to the custom of London,[5] now extended by statute in England to every married woman carrying on a trade separately from her husband,[6] or one who is to be treated as a *feme sole* by reason of a judicial separation, her husband's desertion, or his being a convict.[7]

[1] Ex parte Mear, 2 Bro. C. C. 266.

[2] Woodman *v.* Chapman, 1 Camp. 189; Shattock *v.* Shattock, L. R. 2 Eq. 182.

[3] Ex parte Deacon, 5 B. & A. 759. See 7 Geo. IV., c. 57, § 72; 1 & 2 Vict., c. 110, § 101.

[4] Chalk *v.* Deacon, 6 Moore, 128; Benyon *v.* Jones, 15 M. & W. 566.

[5] Ex parte Carrington, 1 Atk. 206; Lavie *v.* Phillips, 3 Burr. 1776, 1 W. Bl. 570; Com. Dig., Bankrupt, A.

[6] Married Women's Property Act, 1882 (45 & 46 Vict., c. 75, § 1 (5)); Re Edwards, 2 Manson, 182; Re Dagnall (1896), 2 Q. B. 407. See Re Helsby, 1 Manson, 12.

[7] Ex parte Franks, 7 Bing. 762; Re Lyons, 2 Sawyer, 524, Fed. Cas. No. 8649; Re Ruddell, 2 Lowell, 124, Fed. Cas. No. 12,109.

In many of the United States married women have been relieved of all disabilities and made liable to all the obligations of single women. In these States they are subject to any bankrupt law of the State, or of the United States, which may be in force.[1]

In England it has been held that a married woman who is not personally liable to execution, although her separate property may be so liable, cannot be made a bankrupt. The result that one or a few creditors may thereby secure their whole debts, in preference, is regretted, but held irremediable.[2]

In this country this precise point has not been adjudged. The intimations are that the existence of separate property may be a sufficient ground for proceedings, upon due allegation.[3] There seems no valid objection to a limited bankruptcy; for when a married woman is bankrupt, only her separate property can be taken by her creditors; and there are limited bankruptcies of aliens and foreign corporations. If a married woman dies insolvent, her separate property becomes equitable assets, to be divided *pro rata* among her creditors.[4]

§ 16. **Infants.** — It is said that an infant who owes debts of a sufficient amount for necessaries, or upon judgment for tort, may be bankrupt.[5] Generally speaking, an infant who does not owe such debts cannot be the subject of a petition, voluntary or involuntary.[6] In England the Chancellor formerly would

[1] Re Kinkead, 3 Biss. 405, Fed. Cas. No. 7824; Re Collins, 3 Biss. 415, Fed. Cas. No. 3006; Graham *v.* Stark, 3 N. B. R. 357, Fed. Cas. No. 5676; Binney *v.* Globe Bank, 150 Mass. 574; Act of 1898, c. 1 (23).

[2] See Ex parte Holland, L. R. 9 Ch. 307; Ex parte Jones, 12 Ch. D. 484; Johnson *v.* Gallagher, 30 L. J. Ch. 298, and 3 De G. F. & J. 494. In the Law Journal the decision appealed from is given in a note. Re Gardiner, 20 Q. B. D. 249; Scott *v.* Morley, 20 Q. B. D. 120, 132; Becket *v.* Tasker, 19 Q. B. D. 7; Pelton *v.* Harrison (1891), 2 Q. B. 422; Re Lynes (1893), 2 Q. B. 113; Re Hewett (1895), 1 Q. B. 328, disapproving *dictum* of *Lindley, J.*, in Holtby *v.* Hodgson, 24 Q. B. D. 103, 108.

[3] See Re Slichter, 2 N. B. R. 336, Fed. Cas. No. 12,943; Re Goodman, 5 Biss. 401, Fed. Cas. No. 5540.

[4] Thompson *v.* Bennett, 6 Ch. D. 739. [A married woman cannot be made bankrupt for acts of bankruptcy committed while single. Re A Debtor, 5 Manson, 122.]

[5] Willis, 6. See Re Smedley, 10 L. T. N..s. 432.

[6] Rex *v.* Cole, 1 Ld. Raym. 443, 12 Mod. 243; Ex parte Sydebotham, 1

not supersede a commission, if the infant had held himself out as an adult, but left him to his remedy at law.[1] This practice has not been adopted here.[2] At law the proceedings were held voidable, and he could recover at least nominal damages.[3] In this country the adjudication in bankruptcy is conclusive in collateral actions, and the court of bankruptcy should amend all proceedings which would be voidable at law.[4] A court of bankruptcy or equity in either country would probably refuse to interfere after an estate had been settled; so that the affairs could not be restored to their original condition, or where the bankrupt had omitted to avail himself of a right of appeal.[5]

§ 17. **Whether the Debtor can ratify after attaining Majority.** — By a recent statute in England all contracts of infants for money lent or goods sold, except contracts for necessaries, are made absolutely void, and incapable of ratification. Trading is not now a holding out which makes an infant liable to be or be made a bankrupt, although whether a fraudulent representation by a person who appears to be of full age will be sufficient is left doubtful.[6] A judgment by default against a debtor, after he came of age, is not a good petitioning creditor's debt;[6] and a conviction of an infant for defrauding his creditors in bankruptcy will be quashed, if there is no evidence of indebtedness for necessaries.[7]

In this country neither of the decisions would be followed; because the judgment would be a ratification, and because the adjudication could not be impeached collaterally.[8]

Atk. 146; Ex parte Henderson, 4 Ves. 164; Ex parte Barwis, 6 Ves. 601; Ex parte Hehir, 3 Des. & Ch. 107; Ex parte Lees, 1 Des. 705; Farris *v.* Richardson, 6 Allen, 118; Re Derby, 6 Ben. 232, Fed. Cas. No. 3815; McLean *v.* Dummett, 22 L. T. N. S. 710. See Lovell *v.* Beauchamp (1894), A. C. 607.

[1] Ex parte Watson, 16 Ves. 265; Ex parte Bates, 2 M. D. & De G. 337; Ex parte Unity Bank, 3 De G. & J. 63.

[2] See Re Derby, 6 Ben. 232, Fed. Cas. No. 3815.

[3] See note 6, p. 11.

[4] See cases in note 6, p. 11.

[5] See Ex parte Moule, 14 Ves. 602; Re West, 3 De G. M. & G. 198; Re Mew, 2 Ch. D. 320; Ex parte Proudfoot, 1 Atk. 252.

[6] Ex parte Kibble, L. R. 10 Ch. 373; Ex parte Jones, 18 Ch. D. 109; overruling Ex parte Lynch, 2 Ch. D. 227, but intimating that Ex parte Unity Bank, 3 De G. & J. 63, may still be law. See Ex parte Lees, 1 Des. 705.

[7] Queen *v.* Wilson, 5 Q. B. D. 28; Re Beauchamp Bros. (1894), 1 Q. B. 1. See Lovell *v.* Beauchamp (1894), A. C. 607.

[8] Winchester *v.* Thayer, 129 Mass. 129.

Whether proceedings actually begun against an infant can be ratified by him after he is of age has been mooted. If the ratification would injure innocent third persons, the courts would probably refuse to recognize it.[1] If there were no intervening equity, it would seem that it might validate the proceedings.[2]

§ 18. **Insane Debtor.** — A debtor who is lunatic and incapable of contracting cannot commit an ordinary act of bankruptcy;[3] but if, while sane, or in a lucid interval, he has committed such an act, he may be proceeded against while insane, if he is duly represented by a guardian or committee.[4] The technical act of bankruptcy which consists of filing a voluntary petition may, it seems, be done by his guardian or committee in the interest of equality among his creditors.[5]

§ 19. **Undischarged Bankrupt.** — A second petition in bankruptcy, while proceedings are pending under an earlier one, and when the bankrupt has not been discharged, is nugatory, and will not be sustained, if it merely affect the same debts and the same property which are comprehended in the pending case.[6] The application of this principle is more extensive in England than here, because there the assignees have a right to take all the after-acquired property of an undischarged bankrupt until the proceedings are closed, so that there can be no assets in the second bankruptcy except by estoppel; and it was until lately held that there could be no valid bankruptcy without assets to administer;[7] but in later cases a second or third bankruptcy is upheld for what it may be worth.

[1] Re Derby, 6 Ben. 232, Fed. Cas. No. 3815.

[2] Winchester *v.* Thayer, 129 Mass. 129, 133, per *Gray, C. J.*

[3] Ex parte Priddey, Cooke (7th ed.), 43; Ex parte Stamp, 1 De G. 345; Re Marvin, 1 Dillon, 178, Fed. Cas. No. 9178.

[4] Anon., 13 Ves. 590; Re Pratt, 2 Lowell, 96, Fed. Cas. No. 11,371. See Ex parte Farr, 10 L. T. N. S. 44; Re Weitzel, 14 N. B. R. 466, Fed. Cas. No. 17,365; doubting Re Murphy, 10 N. B. R. 48, Fed. Cas. No. 9946.

[5] See Ex parte Cahen, 10 Ch. D. 183; Re Lee, 23 Ch. D. 216, Willis, 6; Re James, 12 Q. B. D. 332.

[6] Re Stewart, 3 N. B. R. 108, Fed. Cas. No. 13,419; Ex parte Sydney, L. R. 10 Ch. 208. [See Re Clark (1894), 2 Q. B. 393, where it was held that creditors under a second bankruptcy acquired no rights against the trustee under the first bankruptcy by dealing with the bankrupt without the knowledge of the trustee.]

[7] Morgan *v.* Knight, 15 C. B. N. S. 669; Ex parte Watson, 12 Ch. D. 380; Ex parte Butler, 2 M. D. & De G. 731.

If, however, it is shown that a better result will be reached for the creditors, the earlier petition may be stayed, and the later be permitted to proceed.[1] If the first case is pending in a different judicial district within the general jurisdiction of the United States, the second may be retained until it is found which will be the more convenient forum.[2] If the first case is pending in a country foreign to that in which the second case is begun, and there is reason to suppose that a domestic adjudication will be useful, it may be granted, *valeat quantum*;[3] otherwise, if there is nothing to be gained by it.[4] So where the first case is by or against only some members of a firm, and the second concerns them all, a joint decree may be rendered for what it may be worth.[5]

A bankrupt, in this country, may acquire property during his bankruptcy, subject only to the usual legal remedies by his new creditors; and by his old creditors, too, if he should not obtain his discharge; and it is not necessary that a bankrupt should have any assets. If, therefore, a bankrupt who has not obtained his discharge contracts fresh debts to the requisite amount, or acquires fresh property, a second bankruptcy will be valid. In such case the creditors whose debts are provable under the first proceedings are not affected by a discharge acquired under the second, unless they elect to come in and prove. If they do prove, they will be bound by the discharge, if obtained.[6]

[1] Ex parte Taylor, 6 De G. M. & G. 737; Ex parte Louch, De G. 463; Ex parte Roberts, 3 De G. F. & J. 747; Ex parte Wieland, L. R. 5 Ch. 486; Re City & County Bank, L. R. 10 Ch. 470; Ex parte Squire, L. R. 4 Ch. 47; Ex parte Walton, L. R. 10 Ch. 215; Ex parte Dimond, L. R. 5 Ch. 743.

[2] Re Wielarski, 4 N. B. R. 390, Fed. Cas. No. 17,619. See Act of 1898, § 32, and Rule VI., *infra*, § 495. Re Flanagan, 18 N. B. R. 439, Fed. Cas. No. 4850.

[3] Re McCulloch, 14 Ch. D. 716; Lyall *v.* Jardine, L. R. 3 P. C. 318.

[4] Re Robinson, 22 Ch. D. 816.

[5] Re Jewett, 15 N. B. R. 126, Fed. Cas. No. 7306.

[6] Fisher *v.* Currier, 7 Met. 424; Gilbert *v.* Hebard, 8 Met. 129; Shelton *v.* Codman, 3 Cush. 318; Whitney *v.* Willard, 13 Gray, 203; see, per *James, L. J.*, Re Watson, 12 Ch. D. 380, 382; Re Drisko, 2 Lowell, 430, Fed. Cas. No. 4090; affirmed, 14 N. B. R. 551, Fed. Cas. No. 4086. See under an early law which resembled ours, Hovil *v.* Browning, 7 East, 154; Todd *v.* Maxfield, 3 B. & C. 222; Van Ingen *v.* The Justices, 166 Mass. 128–130.

§ 20. **Aliens.** — Strangers were in terms made subject to the bankrupt law of England by 21 Jac. I., c. 19, § 15. This was construed to mean persons who had traded in or to England and who had property there.[1] By the statute of 1883, § 6, no alien can be made bankrupt who has not had a dwelling-house or place of business in England.[2] This does not mean that every one who has had such residence or place of business may be made bankrupt. Upon general principles of international law no foreigner can be so dealt with by a notice served upon him out of England, unless, perhaps, if he has committed an act of bankruptcy within the kingdom.[3]

The general rule with us is that any permanent resident may be made a bankrupt;[4] and in Massachusetts[5] and Maine[6] there are recent statutes, by the former of which foreign corporations having property and a place of business in the State are made subject to the law in respect to such property; and in the latter non-residents are, by implication, at least, included in the description of persons so subject.

§ 21. **Partners.** — When partners, or any two or more of them, are insolvent, they may petition jointly; or some or one of them may petition, and require the others to be summoned. If any of the respondents are not insolvent, the petition as to them is to be dismissed.[7]

[1] Bird *v.* Sedgwick, 1 Salk. 110; Doddesworth *v.* Anderson, Raym. 375; Ex parte Williamson, 1 Atk. 81; Williams *v.* Nunn, 1 Camp. 152, 1 Taunt. 270; Ex parte Smith, Cowp. 403; Alexander *v.* Vaughan, Cowp. 398; Allen *v.* Cannon, 4 B. & A. 418. See *infra*, § 465.

[2] [But if he be subject to commitment under the Debtors' Act of 1869, a receiving order may be made against him if he be served with process in England. Re Clarke, 4 Manson, 231.]

[3] Ex parte O'Loghlen, L. R. 6 Ch. 406; Ex parte Pascal, 1 Ch. D. 509; Re Gutierrez, 11 Ch. D. 298; Ex parte Crispin, L. R. 8 Ch. 374; Ex parte Blain, 12 Ch. D. 522; Ex parte Robinson, 22 Ch. D. 816; Ex parte Pearson (1892), 2 Q. B. 263. See also Re Hecquard, 24 Q. B. D. 71; Re Duleep Singh, 7 Morrell, 228; Re Nordenfelt (1895), 1 Q. B. 151.

[4] Judd *v.* Lawrence, 1 Cush. 531; Re Goodfellow, 1 Lowell, 510, Fed. Cas. No. 5536; Re Boyntou, 10 Fed. Rep. 277; Phelps *v.* McDonald, 99 U. S. 298.

[5] Stat. 1890, c. 321; Buswill *v.* Iron Hall, 161 Mass. 224; Kelley *v.* Lumber Co., 167 Mass. 28.

[6] Stat. 1891, c. 109; Stetson *v.* Hall, 86 Me. 110; Peabody *v.* Stetson, 88 Me. 273; Chipman *v.* Peabody, 88 Me. 282.

[7] Re Penn, 5 N. B. R. 30, Fed. Cas. No. 10,927; Re Bennett, 2 Lowell, 400, Fed. Cas. No. 1314; Act of 1898, § 5, *infra*, § 468.

§ 22. **Retired Partner.** — Partnerships continue for the purposes of the act, after a voluntary dissolution, until the joint affairs are settled.[1] All the courts held that a retired partner remained liable to proceedings so long as joint assets remained undisposed of, and most of them so long as joint debts were outstanding.[2] The words of the late law included both categories.

Whether a partner already adjudged bankrupt can petition against or for the firm, *quære*.[3] It has been held that his assignees may.[4]

§ 23. **Surviving Partner.** — Where one of two partners has died, the survivor may be made bankrupt, both as an individual and as surviving partner,[5] and his assignees will have the right to recover partnership property from the heirs or representatives of the decedent.[6] In administering the affairs, the assignees are to marshal the assets between joint and separate creditors, as if all were living.[7] In one of the States the administrator has by statute the right to wind up the affairs.[8]

§ 24. **Special, Dormant, and Nominal Partners.** — Where a special partner has failed to comply with the terms of the law, and thereby becomes liable as a general partner, he may, at the election of the creditors, be included in a petition against the firm.[9] Persons held out to the world generally as partners,

[1] Act of 1898, § 5 a, *infra*, § 468.

[2] See Parker *v.* Phillips, 2 Cush. 175; McDaniel *v.* King, 5 Cush. 469; Re Crockett *et al.*, 2 Ben. 514, Fed. Cas. No. 3402; Re Noonan, 3 Biss. 491, Fed. Cas. No. 10,292; Re Williams, 1 Lowell, 406, Fed. Cas. No. 17,703; Re Grady, 3 N. B. R. 227, Fed. Cas. No. 5654; Re Greenfield, 5 Ben. 552, Fed. Cas. No. 5772; Re Crockett, 2 N. B. R. 208, Fed. Cas. No. 3402; Re Foster, 3 Ben. 386, Fed. Cas. No. 4962; Hopkins *v.* Carpenter, 18 N. B. R. 339, Fed. Cas. No. 6686.

[3] Dearborn *v.* Keith, 5 Cush. 224.

[4] Shumate *v.* Hawthorne, 3 N. B. R. 227, Fed. Cas. No. 5654.

[5] Re Simpson, 1 Atk. 137; Burnside *v.* Merrick, 4 Met. 537; Howard *v.* Priest, 5 Met. 582; Rice's Case, 7 Allen, 112; Briswalter *v.* Long, 14 Fed. Rep. 153; Adams Bank *v.* Rice, 2 Allen, 480; Durgin *v.* Coolidge, 3 Allen, 554; Re Stevens, 1 Sawyer, 397, Fed. Cas. No. 13,393; Ex parte Leaf, Mont. & Ch. 662.

[6] Burnside *v.* Merrick, 4 Met. 537; see note 5.

[7] Ibid.

[8] Re Daggett, 8 N. B. R. 287, 433, Fed. Cas. Nos. 3535, 3536; s. c. *nom.* Re Sectional Dock Co., 3 Dillon, 83, Fed. Cas. No. 12,606.

[9] Lancaster *v.* Choate, 5 Allen, 530; Re Merrill, 12 Blatch. 221, Fed. Cas. No. 9467.

called by Lindley nominal partners, including former partners so held out, fall within the same rule,[1] but not those who are only liable to certain particular creditors by estoppel.[2] Lindley says:[3] "A dormant partner may be either included in an adjudication against the firm, or be adjudged bankrupt on a petition against him separately.[4] The same, it is apprehended, is true of nominal partners." It has been held that a nominal partner cannot maintain a petition for adjudication against himself and the others, as insolvents, because, as between themselves, they are not partners.[5]

§ 25. **Corporations.** — Moneyed, business, and commercial corporations were made subject to the statute of 1867. This description includes banks organized under State laws,[6] insurance companies,[7] railroad companies,[8] and, in short, all private corporations, excepting such as are devoted to ecclesiastical or charitable purposes.

National banks were held not to be within the law of 1867, for the reason that special provisions are made for them by the acts under which they are incorporated.[9]

§ 26. **Residing.** — That one "resides" within the United States means, in this and similar statutes, that he is more than a transient sojourner; a resident, an inhabitant, or a

[1] Ex parte Murton, 2 M. D. & De G. 152; Ex parte Arboin, 1 De G. 359; Re Rowland, L. R. 1 Ch. 421; Re Krueger, 2 Lowell, 66, Fed. Cas. No. 7941; Re Jewett, 15 N. B. R. 126, Fed. Cas. No. 7306; Ex parte Hayman, 8 Ch. D. 11; Re McFarland, 10 N. B. R. 381, Fed. Cas. No. 8788. See Moore *v.* Walton, 9 N. B. R. 402, Fed. Cas. No. 9779.

[2] Wall *v.* Balcom, 9 Gray, 92; Ex parte Sheen, 6 Ch. D 235.

[3] Lindley, Partnership, 6th ed., p. 650.

[4] Citing Ex parte Hamper, 17 Ves. 403.

[5] Hanson *v.* Paige, 8 Gray, 239.

[6] Thornhill *v.* The Bank of Louisiana, 3 N. B. R. 435, Fed. Cas. No. 13,990. The Act of 1898 does not apply to State banks. § 4 b.

[7] Re Merchants' Ins. Co., 6 N. B. R. 43, Fed. Cas. No. 9441.

[8] Adams *v.* B. H. & E. R. R. Co., 1 Holmes, 30, Fed. Cas. No. 47; affirmed, *nom.* Sweatt *v.* B. H. & E. R. R. Co., 3 Cliff. 339, Fed. Cas. No. 13,684; Ala. & Chattanooga R. R. Co. *v.* Jones, 5 N. B. R. 97, Fed. Cas. No. 126; Re Cal. Pac. R. R. Co., 3 Sawyer, 240, Fed. Cas. No. 2315; Winter *v.* Iowa, etc. R. R. Co., 2 Dillon, 487, Fed. Cas. No. 17,890; N. O., etc. R. R. Co. *v.* Delamore, 114 U.S. 501; Re South. Minn. R. R. Co., 10 N. B. R. 86, Fed. Cas. No. 13,188. So under the winding-up acts. See *infra*, § 467.

[9] Re Manuf. Nat. Bank, 5 Biss. 499, Fed. Cas. No. 9051. National banks are excepted now. Act of 1898, § 4 b.

person having a domicile, are substantially equivalent expressions.[1] In one case the debtor's most usual abiding place, which was his place of business, was held to be his only residence, though his family lived elsewhere, and he often visited them. This decision may be questioned.[2] It is no objection to the residence that it has been acquired lately, and with the intent to benefit by the bankrupt law.[3]

The provision that the debtor shall apply in the place where he has resided for the last six months, or for the longest period during that time, does not require him to have resided within the United States for six months, or in any particular State for the greater part of that time; but, for the supposed convenience of his creditors, that the place in which he has resided the longest, though it be only for one day, shall be chosen.[4]

§ 27. **Jurisdiction of Debtor who has removed from the United States.** — It was held under the statute of Massachusetts, which applied only to debtors residing within the State, that a permanent removal by one who had committed an act of bankruptcy ousted the jurisdiction of the courts of the State.[5] This was soon changed by an act of the Legislature.[6]

§ 28. **Traders.** — Most of the statutes make certain acts by traders a ground for proceeding by creditors, which are not so when done by non-traders.

Under the early acts in England which applied only to traders, so much refinement was indulged in by the courts in deciding what was a trading, that later statutes gave an alphabetical list of the occupations which were to be so considered.

[1] Re Kinsman, 1 N. Y. Leg. Obs. 309, Fed. Cas. No. 7832; Stiles *v.* Lay, 9 Ala. 795; Roosevelt *v.* Kellogg, 20 Johns. 208; McDaniel *v.* King, 5 Cush. 469; Cutter *v.* Folsom, 17 N. H. 139; Cobb *v.* Rice, 130 Mass. 231; Re Walker, 1 Lowell, 237, Fed. Cas. No. 17,061; Re Goodfellow, 1 Lowell, 510, Fed. Cas. No. 5536. See *infra*, § 465.

[2] Re Watson, 4 N. B. R. 613, Fed. Cas. No. 17,272.

[3] Re Goodfellow, 1 Lowell, 510, Fed. Cas. No. 5536; McConnell *v.* Kelley, 138 Mass. 372.

[4] Re Goodfellow, 1 Lowell, 510, Fed. Cas. No. 5536; Re Foster, 3 N. B. R. 236, Fed. Cas No. 4962.

[5] Claflin *v.* Beach, 4 Met. 392.

[6] Stat. 1844, c. 178, now regulated by Stat. 1895, c. 209.

There has been no such difficulty in this country, and I shall not cite many of the cases.

That a trade is illegal, or the whole scheme of a trading corporation is fraudulent, is no objection to proceeding in bankruptcy or winding up, if there are outstanding valid debts.[1] The courts have held that the fact of the trading being but a small part of the debtor's vocation did not necessarily relieve him;[2] but to be a trader, one must be both a buyer and a seller,[3] and some trifling trading in connection with other business may be excused.

§ 29. **Retired Trader.** — It was held under the act of 1867 that a trader who had given commercial paper and retired from business, before or after its maturity, was to be considered as still a trader for the purposes of this clause, until the paper was paid.[4] So when the bankrupt law of England only applied to traders, one who had retired was subject to its operation until all his trade debts were paid.[5] Under later English statutes, creating different acts of bankruptcy for traders and non-traders, it has been held that one must be actually a trader when he commits those acts.[6] A note given by one who had retired from business, for a debt contracted while in trade, was held not to be given in the course of business, nor by a trader.[7]

[1] Ex parte Meymot, 1 Atk. 196; Cobb *v.* Symonds, 5 B. & A. 516; Ex parte Day, 1 Ch. D. 699; Leifchild's Case, L. R. 1 Eq. 231; Re London and County Coal Co., L. R. 3 Eq. 355.

[2] Ex parte Gibbs, 2 Rose, 38; Heanny *v.* Birch, 3 Camp. 233.

[3] Hankey *v.* Jones, 2 Cowp. 745.

[4] Re Weikert, 3 N. B. R. 27, Fed. Cas. No. 17,361; Davis *v.* Armstrong, 3 N. B. R. 33, Fed. Cas. No. 3624.

[5] Ex parte Bamford, 15 Ves. 449; Bailie *v.* Grant, 9 Bing. 121; Ex parte Griffiths, 3 De G. M. & G. 174. [So of a married woman subject to bankruptcy. Re Dagnall (1896), 2 Q. B. 407.]

[6] Ex parte Schomberg, L. R. 10 Ch. 172; Ex parte McGeorge, 20 Ch. D. 697.

[7] Jack's Case, 1 Woods, 549, Fed. Cas. No. 7120.

CHAPTER III.

ACTS OF BANKRUPTCY.

§ 30. **Voluntary Petition.** — A person who by his residence and indebtedness is subject to be made bankrupt may, under our law, file a petition in the proper court for an adjudication. This is called a voluntary petition, and is, of itself, an act of bankruptcy; so that, if the debtor fails to prosecute the proceedings the creditors may intervene and carry them forward.[1]

In England the debtor may file what is called a liquidation petition, which is an act of bankruptcy, of which his creditors only, and not he, can take advantage to make him judicially bankrupt, though he may offer a composition.[2]

In voluntary petitions the questions of residence and indebtedness are heard *ex parte*, and an adjudication is conclusive.[3]

§ 31. **Involuntary Proceedings.** — Acts of bankruptcy by a debtor which will authorize proceedings against him by his creditors are certain acts or omissions specified in the statute which tend to prove that he is either unwilling or unable to pay his debts. Those of the former class involve an intent to delay or defraud creditors; those of the latter class are independent of intent.[4]

§ 32. **Intent.** — If an act is done whose natural tendency and effect is to defraud creditors, the intent is inferred. And this presumption is not rebutted by proof that the debtor was

[1] Re Harris, 3 N. Y. Leg. Obs. 152, Fed. Cas. No. 6110; Re Randall, 5 Law Reporter, 115, Fed. Cas. No. 11,550; Re Goodfellow, 1 Lowell, 510, Fed. Cas. No. 5536; Re Fowler, 1 Lowell, 161, Fed. Cas. No. 4998. See Act of 1898, § 59 f.

[2] Robson, Bankruptcy, 7th ed., p. 741. [This subject is now controlled by B. A. 1890, § 3. See Robson, p. 745.]

[3] Re Fowler, 1 Lowell, 161, Fed. Cas. No. 4998; Oriental Bank *v.* Richer, 9 App. Cas. 413; Pennell *v.* Butler, 18 C. B. 209.

[4] Act of 1898, § 3; *infra*, § 466.

impelled to the act by motives which had no reference to his creditors; such as that the immediate occasion of departing the realm, or of giving a preference, was fear of a criminal prosecution.[1] Speaking of preferences, an eminent judge says: "Every person is presumed to intend the natural and probable consequences of his own acts; and if such acts do, in fact, . . . give a very large preference, it is competent for the jury to infer the intent. It does not rebut this intent to show that the debtor has also another motive to the proceeding."[2]

So Lord Westbury said: "There are two maxims that must never be weakened, — that you must ascribe to every subject a knowledge of the law . . .; that you must ascribe to every man a knowledge of that which is a necessary and inevitable result of an act deliberately done by him."[3] All the authorities agree in this.[4] In England preference must be the sole motive; but this rule is not followed here.[5]

§ 33. **Departing the State.** — In the first English statute upon this subject, that of 34 & 35 Henry VIII., c. 4, one of the two acts of bankruptcy therein defined was of persons who "suddenly flee to parts unknown, not minding to pay or restore to any their creditors, their debts and duties." And to depart the realm with intent to defraud creditors has remained one of such acts through all changes and revisions of the laws.

As strangers trading to England were subject to the bankrupt laws if they committed any of the defined acts within the realm, such a person might render himself liable to adjudication by leaving the country to go to his own home. But the intent could not be inferred from the act in such a case, and

[1] Traders' Bank *v.* Campbell, 14 Wall. 87; Woodier's Case, Bull. N. P. 39; Raikes *v.* Poreau, Cooke (7th ed.), 80; Vernon *v.* Hankey, Cooke (7th ed.), 111; Ex parte Kilner, 2 Des. 324; Holroyd *v.* Whitehead, 8 Camp. 530, 2 Rose, 145; Fowler *v.* Padget, 7 T. R. 509; Deffle *v.* Desanges, 8 Taunt. 671; Warner *v.* Barber, Holt, N. P. 175.

[2] Per *Shaw, C. J.*, Denny *v.* Dana, 2 Cush. 160, 172.

[3] *Lord Westbury* in Carter *v.* McLaren, L. R. 2 Sc. App. 120, 126.

[4] Re Drummond, 1 N. B. R. 231, Fed. Cas. No. 4093; Re Sutherland, Deady, 344, Fed. Cas. No. 13,638; Ex parte Goater, 22 W. R. 935; Hardy *v.* Clark, 7 Blatch. 262, Fed. Cas. No. 6058; McKenzie *v.* Garrison, 10 Rich. 238.

[5] See *infra*, § 71.

must be clearly proved. This is true of an Englishman domiciled abroad.[1]

Our statutes, as we have seen, apply only to residents; and, accordingly, the act defined in the law of 1867 was to depart from the State, District, or Territory of which the debtor is an inhabitant, that is, resident, as before defined. It may, therefore, be committed by a removal to another State or District within the United States, as well as by departing from the United States. It is not the purpose of the statute to interfere with the freedom of debtors in travelling for business or pleasure;[2] but if the natural consequence of the act is to delay creditors, the intent may be presumed, or it may be proved by the debtor's declarations.[3]

That creditors have or have not been delayed, is pertinent evidence on this issue; and if they have been, the fact is almost conclusive;[4] but if the intent is proved in any mode, the act is complete at the instant of departure, and before any creditor has been delayed.[5] Some of the English cases relate to departure from the dwelling-house, or "otherwise absenting himself," or other acts which are not acts of bankruptcy with us; but upon the point of intent they are pertinent.

§ 34. **Remaining absent.** — Remaining absent with like intent.[6] This act was added by 6 Geo. IV., c. 16, § 3, because there was much doubt whether, if the original departure were innocent, the debtor could be made bankrupt by any subsequent change of mind or circumstance.

[1] See Williams *v.* Nunn, 1 Taunt. 270; Pleasants *v.* Meng, 1 Dall. 380; Windham *v.* Paterson, 1 Stark. 144, 2 Rose, 466; Ex parte Crispin, L. R. 8 Ch. 374; Ex parte Gutierrez, 11 Ch. D. 298; Ex parte Brandon, 25 Ch. D. 500.

[2] Ramsbottom *v.* Lewis, 1 Camp. 279.

[3] See Lloyd *v.* Heathcote, 5 Moore, 129; Ex parte White, 3 Ves. & B. 128; Ex parte Harris, 2 Rose, 67; Ex parte Goater, 22 W. R. 935.

[4] Ex parte Kilner, 2 Dea. 324; Young *v.* Wright, 6 Taunt. 540; Fisher *v.* Boucher, 10 B. & C. 705; Ex parte Austen, 2 Dea. 533; Holroyd *v.* Whitehead, 3 Camp. 530; Ex parte Kirkman, 3 Dea. & Ch. 450. Actual delay held not conclusive. Warner *v.* Barber, Holt N. P. 175.

[5] See Robertson *v.* Liddell, 9 East, 487; Harvey *v.* Ramsbottom, 1 B. & C. 55; Wydown's Case, 14 Ves. 81; Ex parte Geisel, 22 Ch. D. 436.

[6] Ex parte Bunny, 1 De G. & J. 309; Ex parte Kirkman, 3 D. & Ch. 450. Act of 1867, § 39, 14 Stat. 536; R. S. § 5021.

§ 35. **Concealment.** — The statute next mentions concealment of the debtor to avoid arrest or the service of legal process, and, presently after, concealment or removal of his property to avoid process. The act and intent being proved, it is immaterial that no process has been actually issued.[1]

Concealment of property includes not only a physical act, but also a concealment of title by fraudulent or fictitious transfers, or by suffering fictitious judgments.[2]

Legal process does not mean such as issues from courts of common law only, but such as any court may issue by which a debt can be recovered; and has been held to include a proceeding for the examination of a debtor to discover property, or for the appointment of a receiver.[3] But property exempted from process cannot be the subject of this fraud;[4] though if a statute brings a new kind of property within the scope of process, the existing statutes against frauds will at once apply to it.[5]

§ 36. **Fraudulent Transfer.** — Or makes a fraudulent transfer of his property. Transfer[6] is defined in section 1 of the statute to mean any payment, gift, sale, or other mode of parting with property or the possession of property, absolutely or conditionally. A fraudulent transfer is one that is made so by the law of the State or place governing the transaction; or by the bankrupt law itself, not being fraudulent at common law. As to the former, the reader is referred to the treatises upon the subject of fraud and fraudulent conveyances. The principal acts which are conventional frauds upon the law of

[1] Chenoweth *v.* Hay, 1 M. & S. 676; Robson *v.* Rolls, 9 Bing. 648; Ex parte Bamford, 15 Ves. 449; Wilson *v.* Norman, 1 Esp. 334; Rouch *v.* Great W. R. Co., 1 Q. B. 51; Fox *v.* Eckstein, 4 N. B. R. 373, Fed. Cas. No. 5009; Warner *v.* Barber, Holt N. P. 175; Ex parte Bamford, 15 Ves. 449. See *infra*, § 466.

[2] O'Neil *v.* Glover, 5 Gray, 144, distinguishing Livermore *v.* Bagley, 3 Mass. 487; Re Williams, 1 Lowell, 406, Fed. Cas. No. 17,703; Fisk *v.* Creditors, 12 Cal. 281.

[3] Brock *v.* Hoppock, 2 N. B. R. 7, Fed. Cas. No. 1912; Hardy *v.* Bininger, 4 N. B. R. 262, Fed. Cas. No. 6057; Hardy *v.* Clark, 3 N. B. R. 385, Fed. Cas. No. 6058; Re Wash. Ins. Co., 2 Ben. 292, Fed. Cas. No. 17,246; Re Merchants' Ins. Co., 3 Biss. 162, Fed. Cas. No. 9441.

[4] See Greenwood *v.* Churchill, 1 Myl. & K. 546; Mather *v.* Fraser, 2 K. & J. 536; Fry *v.* Malcolm, 5 Taunt. 117; Ex parte Smith, 3 M. D. & De G. 144.

[5] Sims *v.* Thomas, 12 A. & E. 536; Edwards *v.* Cooper, 11 Q. B. 33.

[6] See Act of 1898, § 1 (25).

bankruptcy, and not at common law, are assignments for the benefit of creditors, and preferences.

§ 37. **General Assignments.** — A general assignment by an insolvent debtor for the benefit of his creditors has been held an act of bankuptcy by the courts of England for more than a century, though no creditor was preferred; and the assignment was of itself evidence of insolvency.[1] The criticism of the early decisions, which is still repeated by some learned authors and judges, and which applies equally to the judge-made fraud called a preference, was, that no such fraud was known to the common law or to the statute 13 Eliz., c. 5, as originally expounded.

This is true; but the answer is, that when a statute created a system of which the equality of creditors is an essential part, the preference of one creditor to another became constructively fraudulent; and when this statute provided stringent modes of relief by the summary examination of the debtor, by criminal sanctions, and by giving powers of intervention to creditors, it became a constructive fraud for the debtor to evade these remedies, to appoint his own assignees, and to put his property in a course of distribution which could only be regulated by a bill in equity.

In this country the authorities are not entirely harmonious, and decisions and opinions of able jurists can be cited which maintain that such assignments are not invalid.[2]

It is true that such conveyances cannot be impeached excepting by an assignee in bankruptcy, and that if more than

[1] Kettle *v.* Hammond, Cooke, 8th ed., p. 106; Eckhardt *v.* Wilson, 8 T. R. 140; Tappenden *v.* Burgess, 4 East, 230, Simpson *v.* Sikes, 6 M. & S. 295; Stewart *v.* Moody, 1 C. M. & R. 777; Binns *v.* Towsey, 7 A. & E. 869; Thompson *v.* Jackson, 3 M. & G. 621; Jackson *v.* Thompson, 2 Q. B. 887; Turner *v.* Hardcastle, 11 C. B. N. S. 683; Ponsford *v.* Walton, L. R. 3 C. P. 167; Re Wood, L. R. 7 Ch. 302, per *Mellish, L. J.*; Act of 1898, § 3 (4); *infra*, § 466.

[2] Sedgwick *v.* Place, 1 N. B. R. 673, Fed. Cas. No 12,622; Langley *v.* Perry, 2 N. B. R. 596, Fed. Cas. No. 8067 (explained in Globe Ins. Co. *v.* Cleveland Ins. Co., 14 N. B. R. 311, Fed. Cas. No. 5486); Re Wells, 1 N. B. R. 171, Fed. Cas. No. 17,387; Re Kintzing, 3 N. B. R. 217, Fed. Cas. No. 7833; Haas *v.* O'Brien, 66 N. Y. 597; Burrill on Assignments, 4th ed., pp. 69 *et seq.*, 6th ed., pp. 42 *et seq.*; Hewitt *v.* Northrup, 75 N. Y. 506.

six months pass before the bankruptcy, they cannot be impeached at all.[1] But the great weight of authority, as well as of reasoning, was in favor of their being acts of bankruptcy.[2] The simple reason is that the debtor appoints his own assignee, and escapes examination, validating preferences, and generally avoiding the statute. The rule applies to an assignment or the appointment of a receiver with the powers of an assignee, under the statute of a State, and by order of a State court, if procured by the debtor.[2] The statutes in England have adopted the decisions of the courts.[3]

A deed or transfer which is incomplete, as, if it is still in escrow, or is not signed by the debtors or assented to by all the creditors, if such signatures and assent are conditions precedent to its taking effect, is not an act of bankruptcy, because it is not an act at all.[4] In two English cases, which are still cited as authority, deeds which were found in possession of a bankrupt were held to be such acts;[5] but those decisions are founded

[1] Mayer *v.* Hellman, 91 U. S. 496; Boese *v.* King, 108 U. S. 379.

[2] Re Hurst, 7 Wend. 239; Barton *v.* Tower, 5 Law Reporter, 214, Fed. Cas. No. 1085; McLean *v.* Meline, 3 McLean, 199, Fed. Cas. No. 8890; McLean *v.* Johnson, 3 McLean, 202, Fed. Cas. No. 8883; Re Randall, Deady, 557, Fed. Cas. No. 11,551; Gassett *v.* Morse, 21 Vt. 627; Spicer *v.* Ward, 3 N. B. R. 512, Fed. Cas. No. 13,241; Re Burt, 1 Dillon, 439, Fed. Cas. No. 2210; Re Goldschmidt, 3 Ben. 379, Fed. Cas. No. 5520; Re Smith, 4 Ben. 1, Fed. Cas. No. 12,974; Hardy *v.* Clark, 3 N. B. R. 385, Fed. Cas. No. 6058; Platt *v.* Archer, 6 N. B. R. 465, Fed. Cas. No. 11,213; Hardy *v.* Bininger, 4 N. B. R. 262, Fed. Cas. No. 6057; Cragin *v.* Thompson, 12 N. B. R. 81, Fed. Cas. No. 3320; Barnes *v.* Rettew, 8 Phila. 133; Barnwall *v.* Jones, 14 N. B. R. 278, Fed. Cas. No. 1027; Globe Ins. Co. *v.* Cleveland Ins. Co., 14 N. B. R. 311, Fed. Cas. No. 5486; Harding *v.* Crosby, 17 Blatch. 348, Fed. Cas. No. 6050; Boese *v.* King, 108 U. S. 379, 385, per *Harlan, J.*; Re Kasson, 18 N. B. R. 379, Fed. Cas. No. 7617; Platt *v.* Preston, 19 N. B. R. 241, Fed. Cas. No. 11,219; Re Kraft, 4 Fed. Rep. 523; Re Mendelsohn, 12 N. B. R. 533, Fed. Cas. No. 9420; Re Lawrence, 18 N. B. R. 516, Fed. Cas. No. 8133; Macdonald *v.* Moore, 15 N. B. R. 26, Fed. Cas. No. 8763; Re Safe Dep. and Sav. Inst., 7 N. B. R. 392, Fed. Cas. No. 12,211; Re Troth, 1 Fed. Rep. 405; Steel Co. *v.* Manchester Bank, 163 Mass. 252. Wyles *v.* Beals, 1 Gray, 233, shows very clearly the inconsistency of such an assignment with the provisions of the bankrupt law of Massachusetts, though the decision that an attaching creditor could avoid the assignment is inequitable, and has been changed in Massachusetts.

[3] B. A. 1883, § 4 a. See Act of 1898, § 3 (4).

[4] Bowker *v.* Burdekin, 11 M. & W. 128, and cases in the next note. They are all *dicta*.

[5] Pulling *v.* Tucker, 4 B. & A. 382; Botcherby *v.* Lancaster, 1 A. & E. 77.

upon a policy arising out of the doctrine of relation, which does not obtain in this country. If, however, a transfer is capable of being acted on, and of producing a fraudulent effect, it is no defence that it could not be given in evidence in ordinary cases, for want of a stamp, or that it is voidable or revocable, or may be defeated by breach of a condition subsequent.[1]

§ 38. **Procuring Judgment.** — Or, with intent to defraud his creditors, procures or suffers judgment against him, or gives a warrant to confess judgment, or judgment note, with like intent. Such an act would come within the scope of a preference by giving security; or if it were followed by a seizure of property, and was so intended, would be a fraudulent transfer,[2] but the transfer would not be complete until seizure.[3] This clause gives creditors the right to proceed as soon as the security has been given by the debtor, with the intent to defraud, without waiting for action under it.

§ 39. **Knowledge of Transferee.** — In ascertaining the bankruptcy of a debtor for any of the acts involving intent, it is by our law immaterial whether the other party, the transferee, grantee, or preferred creditor, has knowledge of the intent.[4]

This is true as a general proposition in the jurisprudence of England.[5] But an exception was there made in the case of sales and mortgages, because the title of the assignee, relating back to the act, might have destroyed the property of an innocent purchaser.[6] Though this is no longer the law of England, the exception remains. No such injustice can be worked under

[1] Tappenden *v.* Burgess, 4 East, 230; Dutton *v.* Morrison, 17 Ves. 193; Back *v.* Gooch, 4 Camp. 232; Ex parte Treherne, 2 De G. F. & J. 656; Ex parte Wensley, 1 De G. J. & S. 273; Ponsford *v.* Walton, L. R. 3 C. P. 167; Ex parte Squire, L. R. 4 Ch. 47; Hobson *v.* Thelusson, L. R. 2 Q. B. 642; Lees *v.* Whitely, L. R. 2 Eq. 143.

[2] Thompson *v.* Freeman, 1 T. R. 155; Clarion Bank *v.* Jones, 21 Wall. 325; Buckingham *v.* McLean, 13 How. 151; Doe *v.* Carter, 8 T. R. 300; Sharpe *v.* Thomas, 6 Bing. 416; Croft *v.* Lumley, 5 Ellis & B. 648, affirmed, 682; Stevenson *v.* Newnham, 13 C. B. 285; Edwards *v.* Cooper, 11 Q. B. 33. See *infra*, § 466.

[3] Belcher *v.* Gummow, 9 Q. B. 873.

[4] Re Drummond, 1 N. B. R. 231, Fed. Cas. No. 4093.

[5] Ex parte Simpson, 1 De G. 9: Smith *v.* Cannan, 2 Ell. & B. 35; Hall *v.* Wallace, 7 M. & W. 353.

[6] Baxter *v.* Pritchard, 1 A. & E. 456; Rose *v.* Haycock, 1 A. & E. 460; Re Colemere, L. R. 1 Ch. 128.

our law, because the assignee's title relates only to the filing of the petition,[1] and the innocence of a transferee before that time is always a valid defence to him when the assignee challenges his title.

§ 40. **Acts connected with Insolvency, or proving it.** — Mere insolvency of a debtor is not made a sufficient ground for a petition by creditors, because such a petition against a solvent trader might make him insolvent. The statutes have therefore usually required some definite act or omission to be shown, either as conclusive evidence of the fact, such as lying in prison for debt, when imprisonment was the usual remedy; failing to dissolve an attachment; failing to secure an admitted debt overdue; suspending payment; or else some act in addition to insolvency, such as giving a preference, a conventional fraud which cannot be committed by a solvent person.

§ 41. **Definition of Insolvency.** — A trader is insolvent when he cannot pay his debts in the usual course of business, though his property, on a final winding up of his affairs, may be and may be proved beforehand to be sufficient to discharge them in full.[2] As persons who are not traders have no usual course of business, the more extensive meaning of the term would probably be applied to them, of persons whose assets are not equal to their debts.[3]

[1] [Under the act of 1898 the trustee's title relates only to the adjudication. § 70.]

[2] Bayly *v.* Schofield, 1 M. & S. 338; Shone *v.* Lucas, 3 Dow. & Ry. 218; Parker *v.* Gossage, 2 C. M. & R. 617, per *Parke, B.*; Queen *v.* Sadler's Co., 10 H. of L. 404, 426, per *Willes, J.*; De Tastet *v.* Le Tavernier, 1 Keen, 161; Thompson *v.* Thompson, 4 Cush. 127; Herrick *v.* Borst, 4 Hill, 650; Lee *v.* Kilburn, 3 Gray, 594; Hazelton *v.* Allen, 3 Allen, 114; Barnard *v.* Crosby, 6 Allen, 327; Nat. Bank Metropolis *v.* Sprague, 21 N. J. Eq. 530; Toof *v.* Martin, 13 Wall. 40; Buchanan *v.* Smith, 16 Wall. 277; Graham *v.* Stark, 3 N. B. R. 357, Fed. Cas. No. 5676; Re Dibblee, 3 Ben. 283, Fed. Cas. No. 3884; Re Bininger, 7 Blatch. 262, Fed. Cas. No. 6057; Merchants' Bank *v.* Truax, 1 N. B. R. 545, Fed. Cas. No. 9451; Re Gay, 2 N. B. R. 358, Fed. Cas. No. 5279; Anshutz *v.* Hoerr, 1 Fed. Rep. 592; Swan *v.* Robinson, 5 Fed. Rep. 287; May *v.* Le Claire, 18 Fed. Rep. 164; Hayden *v.* Chemical Bank, 84 Fed. Rep. 874; Peabody *v.* Knapp, 153 Mass. 242; Sacry *v.* Lobree, 84 Cal. 41; Sabin *v.* Fuel Co., 25 Ore. 15. [The law is different under the Act of 1898, § 1 (15), *infra*, § 464.]

[3] See Re Scott (1896), 1 Q. B. 619; Adler Co. *v.* Hellman, 75 N. W. Rep. 877 (Neb.); Toof *v.* Martin, 13 Wall. 40, 47.

§ 42. **Suspension of Commercial Paper.** — The late act of Congress and some State statutes make suspension of his commercial paper by a trader, if continued for a certain period, an act of bankruptcy.

Commercial paper in this connection means bills, notes, and other negotiable instruments upon which the holder, by delivery or indorsement, may bring action in his own name according to the custom of merchants or by statute; and paper designed to circulate as money.[1] Since "traders" includes bankers, manufacturers, etc., and "persons" includes corporations, the negotiable bonds or notes of banking, trading, and manufacturing corporations come within this clause.

Whether the paper is made and passed, or contracted in the course of the trader's business (which was required by an amendment to our late statute), is usually a question of fact. It has been held that notes given to raise capital for beginning business, or to settle partnership accounts at its close, are not made in the course of business.[2] Notes indorsed for the accommodation of the maker,[3] or given merely as memoranda of indebtedness,[4] or (as a general rule) notes secured by mortgage, are not business paper in this sense.

Suspension of payment means a general suspension, which, in the case of a trader, is strong evidence of insolvency. Such general suspension may be proved by a single act.[5] But the

[1] Re Nickodemus, 3 N. B. R. 230, Fed. Cas. No. 10,254; Re Shea, 3 N. B. R. 187; Re Stevens, 1 Sawyer, 397, Fed. Cas. No. 13,393; Re Chandler, 1 Lowell, 478, Fed. Cas. No. 2591; Re Carter, 3 Biss. 195, Fed. Cas. No. 2470; Re Kenyon, 6 N. B. R. 238; Re Hercules Mut. Life Soc., 6 N. B. R. 338, Fed. Cas. No. 6402; Re Clemens, 2 Dillon, 533, Fed. Cas. No. 2877; Mendenhall *v.* Carter, 7 N. B. R. 320, Fed. Cas. No. 9426; Love *v.* Love, 21 Pitts. L. J. 101, Fed. Cas. No. 8549; Re Sykes, 5 Biss. 113, Fed. Cas. No. 13,708.

[2] Re Weaver, 9 N. B. R. 132, Fed. Cas. No. 17,307; Re Lanz, 14 N. B. R. 159, Fed. Cas. No. 8079.

[3] Re Clemens, 2 Dillon, 533, Fed Cas. No. 2877; Re Manning, 5 Biss. 491, Fed. Cas. No. 9040; Re Nickodemus, 3 N. B. R. 230, Fed. Cas. No. 10,254. But see Re Chandler, 1 Lowell, 478, Fed. Cas. No. 2591, and Re Clemens, 9 N. B. R. 57, Fed. Cas. No. 2877, note.

[4] Re Westcott, 7 N. B. R. 285, Fed. Cas. No. 17,430.

[5] McLean *v.* Brown, 4 N. B. R. 585, Fed. Cas. No. 8880; Re McNaughton, 8 N. B. R. 44, Fed. Cas. No. 8912; Re Wilson, 8 N. B. R. 396, 5 Biss. 387, Fed. Cas. No. 17,780.

bankrupt act is not to be used to enforce the payment of doubtful claims; and, therefore, if the debtor proves that he intends in good faith, and upon reasonable grounds, to resist payment of the demands in question, the suspension is not sufficient evidence of insolvency.[1] So if the non-payment has been caused by an injunction or a *vis major*, or that the creditors have consented to it.[2] But it is not a valid defence that the debtor has voluntarily put himself in a position to make payment impossible; as by an assignment, or procuring an injunction.[3]

Where both creditor and debtor are acting in good faith, and the only question is as to the validity of the defence set up against the suspended paper or accounts, the better practice is to retain the petition in the court of bankruptcy until the issue can be tried at law.[4] This was done under the former statute in several cases.

§ 43. **Partners.** — If the members of a firm, or any two or more of them, have committed acts of bankruptcy, they may be proceeded against jointly.[5]

It is held in England that a partner cannot be made bankrupt for the acts of his co-partner without his personal privity or participation therein.[6] These decisions, so far as they apply to acts affecting only the partner himself or his separate property, are, of course, sound; but otherwise in respect to acts or omissions affecting all the partners. An act by one member of a firm, within the scope of his authority, in relation to the

[1] Re Thompson, 2 Biss. 166, Fed. Cas. No. 13,936; Re Munn, 3 Biss. 442, Fed. Cas. No. 9925; Nat. Bank *v.* Iron Co., 5 N. B. R. 491, Fed. Cas. No. 9018; McLean *v.* Brown, 4 N. B. R. 585, Fed. Cas. No. 8880; Re Hercules Mut. Life Soc., 6 N. B. R. 338, Fed. Cas. No. 6402; Re Sykes, 5 Biss. 113, Fed. Cas. No. 13,708; Re Westcott, 7 N. B. R. 285, Fed. Cas. No. 17,430; Re Mannheim, 7 N. B. R. 342, Fed. Cas. No. 9038; Re Staplin, 9 N. B. R. 142, Fed. Cas. No. 13,304.

[2] Re Lowenstein, 2 N. B. R. 306, Fed. Cas. No. 8574; Doan *v.* Compton, 2 N. B. R. 607, Fed. Cas. No. 3940; Re Pratt, 9 N. B. R. 47, Fed. Cas. No. 11,369.

[3] Re Laner, 9 N. B. R. 494, Fed. Cas. No. 8055; Hardy *v.* Bininger, 4 N. B. R. 262, Fed. Cas. No. 6057.

[4] See Re Catholic Publishing Co., 2 De G. J. & S. 116.

[5] See *ante*, § 21; Wright *v.* Cohn, 88 Cal. 328.

[6] Mills *v.* Bennett, 2 M. & S. 556; Ex parte Mavor, 19 Ves. 539; Ex parte Addison, 3 De G. & S. 580.

joint property or joint debts, such as giving a preference, making a fraudulent transfer, should be imputed to all the members in this as in all other civil cases. And so are the authorities in this country.[1]

If the members have committed several distinct acts of bankruptcy, they may be made bankrupt jointly, because the sum of all the parts is equal to the whole.[2] This was denied in an early case in Massachusetts without much discussion.[3]

Partners, if insolvent, and if they are indebted severally as well as jointly, may commit an act of bankruptcy in the nature of a preference, by one of them selling out the joint stock to the other; because the assignment tends to convert joint into separate assets, and thus to defraud joint creditors if bankruptcy follows, because the joint and separate assets are marshalled to the joint and separate debts respectively; and so if they convey joint property to secure a separate debt.[4]

[1] See Harrison *v.* Sterry, 5 Cranch, 289; Strang *v.* Bradner, 114 U. S. 555 and cases cited; Fisher *v.* Currier, 5 Law Reporter, 217, Fed. Cas. No. 4818; Re Black, 2 Ben. 196, Fed. Cas. No. 1457; Re Dibblee, 3 Ben. 283, Fed. Cas. No. 3884.

[2] See Hogg *v.* Bridges, 8 Taunt. 200; Spencer *v.* Billing, 3 Camp. 310, 1 Rose, 362; 2 Lindley, 4th Eng. ed., 1095; Robson, 4th ed., 677; Re Penn, 5 N. B. R. 30, Fed. Cas. No. 10,927.

[3] Ensign *v.* Briggs, 6 Gray, 329.

[4] See Anderson *v.* Maltby, 2 Ves. Jr. 244; Re Byrne, 1 N. B. R. 464, Fed. Cas. No. 2270; Ex parte Shouse, Crabbe, 482, Fed. Cas. No. 12,815; Ferson *v.* Monroe, 21 N. H. 462; Ex parte Mayou, 4 De G. J. & S. 664; Phillips *v.* Ames, 5 Allen, 183; Ex parte Kemptner, L. R. 8 Eq. 286; Re Waite, 1 Lowell, 207, Fed. Cas. No. 17,044; Re Johnson, 2 Lowell, 129, Fed. Cas. No. 7369; Ex parte Snowball, L. R. 7 Ch. 534; Re Cook, 3 Biss. 122, Fed. Cas. No. 3150; Re Jones, Willis Bankruptcy, 17, 18; Ransom *v.* Van Deventer, 41 Barb. 307; Wilson *v.* Robertson, 21 N. Y. 587. See *infra*, § 468.

CHAPTER IV.

PETITIONS.

§ 44. **Petition by Creditors.** — When a debtor subject to the law has committed an act of bankruptcy, a creditor or creditors, to whom he owes debts to an amount fixed by the statute, may file a petition against him.

Formerly in England the validity of the commission might always be tried in the courts of common law, and it was there held that the petitioning creditor's debt must be legal and under one of the statutes that it must have been presently payable.

But now the courts of bankruptcy are superior courts, and the older practice is much modified.[1] In this country any debt which could be proved at the first meeting is a good petitioning creditor's debt; and the reader is referred to the chapter on the proof of debts for further information. The courts of bankruptcy here are intrusted with the decision of all necessary questions, and under most statutes have power to summon a jury.

Contingent debts or liabilities are not sufficient, if (as is usual) the statute makes them provable only *sub modo* and under peculiar circumstances.[2]

It has been held that a secured creditor cannot petition; but the better opinion is that if he can show that he is not fully secured, he may be a petitioner in respect of the proved deficiency, or for the full amount if he chooses to abandon his security.[3]

[1] Robson, Bankruptcy, 7th ed., p. 204.

[2] Ex parte Page, 1 Gl. & J. 100; Sigsby *v.* Willis, 3 N. B. R. 207, Fed. Cas. No. 12,849.

[3] Ex parte Mauritz, L. R. 5 Ch. 779; Re Tupper, L. R. 9 Ch. 312; Ex parte Vanderlinden, 20 Ch. D. 289; Re Alexander, 1 Lowell, 470, Fed. Cas. No. 161; *contra*, Re Brainard, 38 Atl. Rep. 71 (Vt.). [Secured creditors may petition if their security is less than their debts. Act of 1898, § 59 b.]

As a general rule, any person who could maintain an action on a debt in his own name, such as an executor, factor, assignee in bankruptcy, may petition for adjudication in respect of such debt.[1] An infant may petition, though the court may require his next friend to become responsible for costs.[2]

When the petition is brought in behalf of a creditor, the authority is sufficient if it is by a partner or joint contractor in behalf of all, by a general agent, by one having full authority to collect debts.[3] In some cases which savor of refinement it has been held that a mere power to bring action will not authorize this peculiar form of suit;[4] but a general appearance and denial of the merits would be a waiver.[5]

§ 45. **A Sole Creditor may petition.** — If there be but one creditor of the supposed bankrupt, he is not to be deprived of the remedies of the bankrupt law, but may file a petition.[6]

§ 46. **Time of filing.** — The petition must be filed within a certain time, in this country usually six months after the act of bankruptcy has been committed.[7]

Time is reckoned as in the ordinary affairs of life, inclusive of the first day and exclusive of the last, or *vice versa*. If the act is done, for example, on the first day of January, a petition filed on the first day of July will be in time.[8]

[1] Ex parte Goodwin, 1 Atk. 100; Rogers *v.* James, 7 Taunt. 147; Sadler *v.* Leigh, 4 Camp. 195; Rumsey *v.* George, 1 M. & S. 176; Ex parte Barber, 1 Gl. & J. 1; Ex parte Paddy, 3 Mad. 241; Ex parte Harding, 10 Jur. N. S. 412; Re Jones, 7 N. B. R. 506, Fed. Cas. No. 7450. [A survivor of two joint creditors may petition. Re Tucker, 2 Munson, 358.]

[2] Ex parte Brocklebank, 6 Ch. D. 358.

[3] Pleasants *v.* Meng, 1 Dall. 380; Ex parte Hodgkinson, 19 Ves. 291; Ex parte Mitchell, 14 Ves. 597; Re Raynor, 7 N. B. R. 527, Fed. Cas. No. 11,597; Spencer *v.* Parke, 4 Hawaiian R. 452.

[4] Guthrie *v.* Fisk, 3 B. & C. 178; Ex parte Bank of Ireland, 1 Moll. 261. See Williams *v.* Harding, L. R. 1 H. L. 9.

[5] Re McNaughton, 8 N. B. R. 44, Fed. Cas. No. 8912.

[6] See Re Alexander, 1 Lowell, 470, Fed. Cas. No. 161; Re Sheehan, 8 N. B. R. 345, Fed. Cas. No. 12,737 (dissenting from Re Johann, 2 Biss. 139, Fed. Cas. No. 7331); O'Neil *v.* Glover, 5 Gray, 144; Ex parte English Joint-Stock Bank, L. R. 6 Ch. 79. [Under the act of 1898 three creditors must join in the petition, unless there are less than twelve creditors in all. § 59 b.]

[7] Act of 1867, § 35, 14 Stat. 536; R. S. § 5129. [Act of 1898, § 3 b, requires the petition to be brought within four months.]

[8] Dutcher *v.* Wright, 94 U. S. 553; Richards *v.* Clark, 124 Mass. 491; Cooley *v.* Cook, 125 Mass. 406. See Bemis *v.* Leonard, 118 Mass. 502; Re

When, however, the act is complete, a petition may be filed on the same day.[1]

Where the act consists of an attachment, judgment lien, or transfer, the time does not begin to run until the recording of the lien or transfer, if by law it must or may be recorded; or until the open, notorious, and exclusive possession of personal property, if possession is required to give the transfer validity.[2]

If the last day is Sunday, or other *dies non* mentioned in the statute, that day is excluded in terms if the computation is by days;[3] and by construction if it is by months or years.[4]

§ 47. **Continuing Acts.** — The act of bankruptcy of remaining abroad with intent to defraud has been held to be continuous, or renewed day by day, so that the petition may be brought at any time while the act and intent exist, no matter how long after they first existed.[5] Some judges hold that the suspension of commercial paper is an act of this character;[6] but on this point the authorities are divided.[7] In the somewhat analogous case of a debtor lying in prison for a certain time, it seems to have been taken for granted that the act was not of a continuing character;[8] nor is it so in case of neglecting to dissolve an attachment.[9]

§ 48. **Amendments.** — The petition should clearly and distinctly allege the facts which give the court jurisdiction, and the acts of bankruptcy relied on.[10]

Heard, 8 Morrell, 144; Re Dawes, 4 Manson, 117. See Re North (1895), 2 Q. B. 264; Miner *v.* Goodyear Co., 62 Conn. 410; Act of 1898, § 31.

[1] Wydown's Case, 14 Ves. 80; Ex parte Dufrene, 1 Ves. & B. 51; Ex parte Kebble, 7 Morrell, 50.

[2] Thornhill *v.* Link, 8 N. B. R. 521, Fed. Cas. No. 13,993; Act of 1898, § 3 b.

[3] Act of 1867, § 48, 14 Stat. 540; R. S. 5013; Act of 1898, § 31.

[4] Lang's Case, 2 N. B. R. 480, Fed. Cas. No. 8056; Cooley *v.* Clark, 125 Mass. 406.

[5] Ex parte Bunny, 1 De G. & J. 309; Bunny *v.* Hunt, 11 Moore P. C. 189. [And so of absenting one's self to defeat creditors. Re Alderson (1895), 1 Q. B. 183.]

[6] Baldwin *v.* Wilder, 6 N. B. R. 85, Fed. Cas. No. 806; Re Raynor, 7 N. B. R. 527, Fed. Cas. No. 11,597.

[7] Mendenhall *v.* Carter, 7 N. B. R. 320, Fed. Cas. No. 9426.

[8] Wallace *v.* Blackwell, 3 Drew. 538.

[9] Gross *v.* Potter, 15 Gray, 556.

[10] Re Drummond, 1 N. B. R. 231, Fed. Cas. No. 4093; Re Randall, Deady, 557, Fed. Cas. No. 11,551; Re Redmond, 9 N. B. R. 408, Fed. Cas. No. 11,632; Re Scammon, 10 N. B. R. 66, Fed. Cas. No. 12,430; Bank *v.* Sherman, 101 U. S. 403.

The court has full power to permit amendments to the petition at any stage of the proceedings, and this power will be liberally exercised.[1] If the amendment introduces a distinct act, not before alleged, and is offered more than six months after its commission, it will be rejected, unless under special circumstances, because the statute bars a petition after this lapse of time.[2] There might be fraud or concealment which would vary this rule.

It has been held that jurisdictional allegations or defects in the execution of the petition cannot be amended,[3] but these decisions are unsound.[4]

§ 49. **Joinder and Withdrawal of Petitioners.** — The petition is necessarily for the benefit of all the general creditors, and a creditor will be permitted to join at any time before or at the hearing.[5] If a sufficient number of creditors failed to join in the original petition, yet the admission of others to join relates back, and makes the date of filing the petition the date of the bankruptcy.[6] Where the statute requires more than one creditor to apply, no creditor who has joined in the petition can withdraw against the will of his co-petitioners.[7] All the

[1] Re Haughton, 1 N. B. R. 460, Fed. Cas. No. 6223; Re Gallinger, 1 Sawyer, 224, Fed. Cas. No. 5202; Re Craft, 2 Ben. 214, Fed. Cas. No. 3316; affirmed, 6 Blatch. 177, Fed. Cas. No. 3317; Hardy *v.* Bininger, 4 N. B. R. 262, Fed. Cas. No. 6057; Re Waite, 1 Lowell, 207, Fed. Cas. No. 17,044; Re Williams, 11 N. B. R. 145, Fed. Cas. No. 17,700; Re Dunhill, 1 Manson, 242.

[2] Re Crowley, 1 N. B. R. 516; Re Maund (1895), 1 Q. B. 194.

[3] Moore *v.* Harley, 4 N. B. R. 242, Fed. Cas. No. 9764; May *v.* Harper, 4 N. B. R. 478, Fed. Cas. No. 9333; Re Rosenfields, 11 N. B. R. 86, Fed. Cas. No. 12,061.

[4] Re Birch, 10 N. B. R. 150; Re California Pac. R. Co., 11 N. B. R. 193, Fed. Cas. No. 2315; Ex parte Jewett, 11 N. B. R. 443, Fed. Cas. No. 7303; Re McKibben, 12 N. B. R. 97, Fed. Cas. No. 8859; Re Sargent, 13 N. B. R. 144, Fed. Cas. No. 12,361; Cunningham *v.* Cady, 13 N. B. R. 525, Fed. Cas. No. 3480; Roche *v.* Fox, 16 N. B. R. 461, Fed. Cas. 11,974; Clay *v.* Towle, 78 Maine, 86.

[5] Re Freedley, Crabbe, 544, Fed. Cas. No. 5079; Foster *v.* Golding, 9 Gray, 50; Re Lacey, 12 Blatch. 322, Fed. Cas. No. 7965; Re Buchanan, 10 N. B. R. 97, Fed. Cas. No. 2073; Re Hawkes, 70 Maine, 213; Re Roberts, 71 Maine, 390; Clay *v.* Towle, 78 Maine, 86. The right is sometimes regulated by statute. See Ex parte Bristow L. R. 3 Ch. 247; Ex parte Wier, L. R. 6 Ch. 875; Re Powell (1891), 2 Q. B. 324; Baker *v.* Kinnaird, 94 Ky. 5. Act of 1898, § 59 f.

[6] Clay *v.* Towle, 78 Maine, 86.

[7] Re Heffron, 6 Biss. 156, Fed. Cas. No. 6321; Re Hawkes, 70 Maine, 213; Re Vogel, 9 Ben. 498, Fed. Cas. No. 16,981; Re Sargent, 13 N. B. R. 144, Fed. Cas. No. 12,361.

petitioners together cannot dismiss the petition, even with the debtor's consent, unless the court concur.[1]

Creditors admitted to prosecute may rely on their own provable debts, if sufficient in amount, and are not bound to show that the original petitioners were creditors, because the purpose of the statute is to guard against collusive proceedings as well as unfair settlements.[2]

§ 50. **Petitioning Creditor.** — By the law of England the petitioning creditor's debt must have been contracted before the act of bankruptcy was committed.[3] The original reason was that all debts contracted after such an act were void, and therefore the supposed creditor was not a creditor;[4] though this reason is no longer sound, the rule is maintained on the ground that a fraud cannot affect subsequent creditors,[5] which is not universally true. The point is rarely taken in this country, and is of little importance. In one case the English law was followed.[6]

§ 51. **What Creditors estopped to petition.** — A creditor who has assented to an act of bankruptcy cannot set it up as the basis of a petition. If the act in question is making an assignment for creditors, any conduct, or even silence when there was opportunity to dissent, as at a meeting of creditors where the subject was discussed, will estop the petitioner.[7] In one

[1] Re Buchanan, 10 N. B. R. 97, Fed. Cas. No. 2073; Re McKeon, 11 N. B. R. 182, Fed. Cas. No. 8858; Re Sheffer, 17 N. B. R. 369, Fed. Cas. No. 12,742. See Re Hester, 22 Q. B. D. 632; Re Flatau (1893), 2 Q. B. 219.

[2] See under a somewhat analogous statute, Ex parte Harris, L. R. 1 Ch. 469; Kynaston v. Davis, 15 M. & W. 705.

[3] Robson, 7th ed., 210, citing Ex parte Holding, 1 Gl. & J. 97; Ex parte Charles, 14 East, 197; Moss v. Smith, 1 Camp. 489; Ex parte Roberts, 1 Mad. 74; Ex parte Bryant, 1 V. & B. 211; Ex parte Sharp, 3 M. D. & D. 490; Ex parte Hayward, L. R. 6 Ch. 546.

[4] Ambrose v. Clendon, Cas. temp. Hard, 267.

[5] Ex parte Hayward, L. R. 6 Ch. 546.

[6] Re Muller, Deady, 513, Fed. Cas. No. 9912. But see Phelps v. Clasen, Woolw. 204, Fed. Cas. No. 11,074.

[7] Bamford v. Baron, 2 T. R. 594, note; Back v. Gooch, 4 Camp. 232, Holt N. P. 13; Ex parte Kilner, Buck, 104; Ex parte Battier, Buck, 426; Ex parte Cawkwell, 19 Ves. 233; Ex parte Shaw, 1 Mad. 598; Ex parte Bunn, 3 Dea. 119; Ex parte Tealdi, 1 M. D. & De G. 210; Ex parte Fernandes, 1 M. D. & De G. 114; Ex parte Payne, 1 De G. 534; Marshall v. Barkworth, 4 B. & Ad. 508; Olliver v. King, 8 De G. M. & G. 110; Tope v. Hockin, 7 B. & C. 101; Ex parte Alsop, 1 De G. F. & J. 289; Ex parte Stray, L. R. 2 Ch. 374; Perry v. Langley, 1 N. B. R. 559, Fed. Cas. No.

case a creditor was held to be bound, though he expressly dissented;[1] but the accuracy of the report of this decision is doubted,[2] and if well reported it is unsound.

Assent given under mistake or misapprehension, without fault on the creditor's part, and more especially if the debtor has purposely misled him, will not be binding;[3] and, of course, an arrangement which the debtor has not carried out within the time limited goes for nothing.[4]

§ 52. **Preferred Creditors.** — A preferred creditor cannot prove until he has surrendered his preference,[5] and therefore cannot petition, unless the court can admit him to pay the amount of his preference into court.

It will be understood that creditors who are estopped from petitioning are not estopped from proving their debts if the debtor is made bankrupt and the assignment is broken up;[6] unless they have received a dividend which would operate as a preference, in which case they would be obliged to surrender it.[5]

§ 53. **Who may defend.** — Not only the debtor, but any person whose rights will be affected by the adjudication, may be admitted to defend a petition *in invitum*, or to apply to set aside the proceedings, or to appeal, as the state of the case may require: such as an attaching creditor, whose lien will be dissolved; one who is alleged to have received a preference, etc.;[7]

11,006; Re Schuyler, 3 Ben. 200, Fed. Cas. No. 12,494; Re Spencer, 3 N. B. R. 512; Re Mass. Brick Co., 2 Lowell, 58, Fed. Cas. No. 9259; Re Williams, 14 N. B. R. 132, Fed. Cas. No. 17,706; Re Michael, 8 Morrell, 305; Re Adamson, 71 L. T. 579; Re Hawley, 4 Manson, 41; Re Woodroff, 4 Manson, 46; Re Murrieta, 3 Manson, 35. See Marr *v.* Washburn, 167 Mass. 35.

[1] Hicks *v.* Burfitt, 4 Camp. 235, note.

[2] Ex parte Bayly, M. & McA. 438; Ex parte Marshall, 1 M. D. & De G. 581, note.

[3] Ex parte Marshall, 1 M. D. & De G. 575; Ex parte Hallowell, 3 M. & Ayr. 538.

[4] Ex parte Foster, 22 Ch. D. 797; Lane's Appeal, 82 Penn. St. 289.

[5] Act of 1867, § 23; 14 Stat. 528; R. S. 5084; Act of 1898, § 57 g.

[6] Re Troth, 1 Fed Rep. 405.

[7] Merriam *v.* Sewall, 8 Gray, 316; Farris *v.* Richardson, 6 Allen, 118; Brewster *v.* Shelton, 24 Conn. 140; Ex parte Jones, 3 Dea. & Ch. 697; Re Bergeron, 12 N. B. R. 385, Fed. Cas. No. 1342; Re Mendelsohn, 12 N. B. R. 533, Fed. Cas. No. 9420; Re Hatje, 12 N. B. R. 548, Fed. Cas. No. 6215; Re Jack, 13 N. B. R. 296, Fed. Cas. No. 7119; Re Williams, 14 N. B. R. 132, Fed. Cas. No. 17,706; Re Derby, 6 Ben. 232, Fed. Cas. No. 3815; Re

so of one who has brought an earlier petition in bankruptcy.[1] Such intervenors may set up all defences which would be open to the debtor himself.[2] An attachment after the proceedings have been begun, and before the decree, is sufficient; but after the title is vested in the assignees, *quære*.[3] The attaching creditor at that time would stand like any other general creditor.

The tendency of opinion under our late bankrupt law was that any creditor having a provable debt might intervene;[4] but for this there seems no good reason, as general creditors are fully protected in the bankruptcy.

§ 54. **Petitioning Creditor cannot receive Payment.** — A creditor who has petitioned for adjudication cannot afterwards receive payment of his debt, because the payment would be an unlawful preference. A tender of the amount is therefore no defence, unless there is no other creditor. This rule is general, independent of any statutory prohibition.[5]

But a creditor is not bound to petition, and his forbearance is a valid consideration for a promise by a third person to pay the debt.[6]

Scrafford, 14 N. B. R. 184, Fed. Cas. No. 12,557; Re Jonas, 16 N. B. R. 452, Fed. Cas. No. 7442; Re Burton, 9 Ben. 324, Fed. Cas. No. 2214; Ex parte Thoday, 2 Ch. D. 229; affirmed, Re Ellis, 2 Ch. D. 797; Re Tucker, 12 Ch. D. 308; Act of 1898, § 59 f.

[1] Re Boston, H. & E. R. R. Co., 9 Blatch. 101, Fed. Cas. No. 1677.

[2] See note 7, p. 36.

[3] Merriam *v.* Sewall, 8 Gray, 316; Re Vogel, 9 Ben. 498, Fed. Cas. No. 16,981.

[4] See Re Austin, 16 N. B. R. 518, Fed. Cas. No. 662; Fogarty *v.* Gerrity, 1 Sawyer, 233, Fed. Cas. No. 4895; Clinton *v.* Mayo, 12 N. B. R. 39, Fed. Cas. No. 2899, though in that case the creditor was alleged to have been preferred, which would seem to work an estoppel. Re Walker, 1 Lowell, 237, Fed. Cas. No. 17,061, where the objection was not taken.

[5] See Howe *v.* Warren, 154 Ill. 227; Terhune *v.* Kean, 155 Ill. 506; Rose *v.* Main, 1 Bing. N. C. 357; Sterndale *v.* Hawkinson, 1 Sim. 393; Ex parte Jay, L. R. 9 Ch. 133; Ex parte Furber, 6 Ch. D. 181; Ex parte Brigstocke, 4 Ch. D. 348; Ex parte Lowe, 7 Morrell, 25; Re Powell, (1891), 2 Q. B. 324. But a petitioning creditor may take judgment on his debt. Re King (1895), 1 Q. B. 189. And see *infra*, tit. Preference; Re Sheehan, 8 N. B. R. 353, Fed. Cas. No. 12,738; Re Liverpool, etc. Assn., L. R. 9 Ch. 511. See Drury *v.* Hounsfield, 11 A. & E. 101; Hollis *v.* Bryant, 4 M. & G. 578.

[6] Ecker *v.* Bohn, 45 Md 278; Ecker *v.* McAllister, 45 Md. 290.

Nor is it unlawful for a third person to buy up the debts of an insolvent friend with a view to avert bankruptcy.[1]

When the duty of the petitioning creditor is dealt with in the act, the cases may turn on the construction of the prohibition.[2]

§ 55. **Costs.** — Since the petition, if granted, has operated for the benefit of the general body of creditors, costs are taxed against the assets, as between solicitor and client.[3]

§ 56. **Withdrawing Petition.** — By leave of court a petition may be withdrawn before adjudication.[4] But as there is great danger of partiality and preference towards the most troublesome creditors, it has been the practice not to grant leave, either in a voluntary or involuntary case, without notice to all the creditors.[5] In involuntary cases, however, all were presumed to have notice of the return day, and if no one appeared to prosecute it the petition might be dismissed. If not then acted on, it was irregular to dismiss it in vacation.

§ 57. **Act of Bankruptcy cannot be condoned.** — An act of bankruptcy cannot usually be condoned; or, as it is commonly expressed, cannot be purged. Thus, where a trader caused himself to be refused to a creditor, not knowing that it was an act of bankruptcy, and on being informed of its consequences, on the same day went at once and paid the debt before it was overdue, he was held to have been rightly adjudged bankrupt. So where the act is the suspension of commercial paper for fourteen days, payment afterwards is no answer.[6]

[1] Robson, 7th ed., p. 227; Fry *v.* Malcolm, 5 Taunt. 117; Ex parte McHenry, 24 Ch. D. 35.

[2] See Ex parte Thompson, 1 Ves. Jr. 157; Ex parte Gedge, 3 Ves. 349; Ex parte Paxton, 15 Ves. 461; Ex parte Kirk, 15 Ves. 464; Ex parte Brine, Buck, 19, 108; Ex parte Masterman, 18 Ves. 298; Ex parte Smith, 1 Rose, 147.

[3] Re Williams, 2 N. B. R. 83, Fed. Cas. No. 17,704; Re Moses, 3 N. B. R. 1; Re Schwab, 2 N. B. R. 488, Fed. Cas. No. 12,498; Re Montgomery, 3 N. B. R. 137, Fed. Cas. No. 9726; Re Dibblee, 3 N. B. R. 754, Fed. Cas. No. 3886; Re N. Y. Mail Co., 3 N. B. R. 627, Fed. Cas. No. 10,208; Ex parte Jaffray, 1 Lowell, 321, Fed. Cas. No. 7170. Approved by *Bradley, J.*, Trustees *v.* Greenough, 105 U. S. 527, 534. Act of 1898, § 64 b (2), (3).

[4] Re Randall, 5 Law Rep. 115, Fed. Cas. No. 11,550; Hastings *v.* Belknap, 1 Denio, 190.

[5] Act of 1898, § 59 g.

[6] Ex parte Gardner, 1 Ves. & B. 45; Wydown's Case, 14 Ves. 86; Robson *v.* Rolls, 9 Bing. 648; Lloyd *v.* Heathcote, 2 Brod. & B. 388; Hammond *v.* Hincks, 5 Esp. 139; Robertson *v.* Liddell, 9 East, 487; Williams *v.* Nann, 1 Taunt.

One reason for these decisions is that the act, when once complete, may be taken advantage of by any creditor, and to pay or compound with one is illegal.

§ 58. **Refusing or annulling Adjudication on Equitable Grounds.** — Notwithstanding the rule that an act of bankruptcy cannot be purged, the Lord Chancellor, when he had the jurisdiction, and the courts since vested with it, have often stayed the proceedings for equitable reasons, though an act of bankruptcy had been committed. In Massachusetts a statute has given this power to the courts of insolvency.[1]

The most usual ground for such action by the court has been that some improper motive, such as to force a payment or a dissolution of a partnership, was at the bottom of the proceeding.[2] Accident or mistake, however, would probably be enough. The practice has been to apply by special petition rather than to oppose the adjudication; but there is no reason at the present time why equitable defences should not be set up in the courts of bankruptcy.[3] Many cases have been stayed for legal reasons, such as that no act of bankruptcy was committed, or that all the debts have been paid or compromised.[4]

§ 59. **Duties and Liabilities of Petitioning Creditor.** — When bankruptcy proceedings were begun only by creditors, and were *ex parte*, the law required the petitioning creditor to give

270; Harvey *v.* Ramsbotton, 1 B. & C. 55; Hallen *v.* Homer, 1 C. & P. 108; Fox *v.* Eckstein, 4 N. B. R. 373, Fed. Cas. No. 5009; Mendenhall *v.* Carter, 7 N. B. R. 320, Fed. Cas. No. 9426. See, per Knowlton, J., Marble *v.* Jamesville Mfg. Co., 163 Mass. 170, 180; Wrenche's Case, Cro. Eliz. 13; Hopkins *v.* Ellis, Salk. 110; Colkett *v.* Freeman, 2 T. R. 59; Mucklow *v.* May, 1 Taunt. 479; Re Ess, 3 Bissell, 301, Fed. Cas. No. 4530.

[1] Stat. 1894, c. 139.

[2] Ex parte Browne, 1 Rose, 151; Ex parte Harcourt, 2 Rose, 203; Ex parte Gallimore, 2 Rose, 424; Ex parte Bowes, 4 Ves. 168; Ex parte Bourne, 2 Gl. & J. 137; Ex parte Christie, 2 Dea. & Ch. 465, 488; Ex parte Kemp, 1 M. D. & De G. 657; Ex parte Johnson, 2 M. D. & De G. 678; Re Gold Hill Mines, 23 Ch. D. 210; Re Atkinson, 9 Morrell, 193; King *v.* Henderson, 79 L. T. 37, (1898) A. C. 720. See Re Painter, 1 Manson, 499; Re Otway (1895), 1 Q. B. 812.

[3] Re Davies, 3 Ch. D. 461; Ex parte Tynte, 15 Ch. D. 125.

[4] English Bankrupt Act, 1883, § 35. [In England a receiving order will not be granted if there are no assets. Re Robinson, 22 Ch. D. 816; Re Betts (1897), 1 Q. B. 50; Re Somers, 4 Manson, 227. See Re Murrieta, 3 Manson, 35; Re Birkin, ib. 291; Re Leonard (1896), 1 Q. B. 473; Re Jubb (1897), 1 Q. B. 641.]

a bond in £200 conditioned to prosecute the commission, and to prove both before the commissioners and in an action at law, if the commission should be contested, that he was a creditor, and that the debtor was a bankrupt within the true intent of the statutes.[1]

In case of breach, the statute authorized the Lord Chancellor to assess the damages, or to permit the bond to be put in suit. It was discretionary with him to refuse to do either, if justice did not seem to require it;[2] or if the debtor had chosen another remedy, such as an action for malicious prosecution.[3]

Since the proceedings are no longer *ex parte*, there is no occasion for security from the petitioning creditor, except when it would be required of any other plaintiff. The statutes do not now, nor does the practice, require a bond, unless when an *ex parte* injunction or warrant is asked for in aid of the proceedings.[4]

§ 60. **Malicious Prosecution of Bankruptcy.** — If one with malice, and without reasonable and probable cause, presents a petition in bankruptcy against another, he is liable to an action.[5]

When this point was first decided, the proceedings were *ex parte*, and an order so granted was no evidence of probable cause.[6] Since the petition is now addressed to a court of full jurisdiction, and an adjudication is after notice, no such action could be maintained if the court made an adjudication, unless the defendant had procured the decision by false and fraudulent evidence.[7]

It was doubted by Martin, B., whether such an action could lie in any case,[8] but the better opinion is that if the petition has been dismissed, and was brought with malice, and without reasonable and probable cause, the petitioner is liable.[9]

[1] 5 Geo. II., c. 30, § 23.

[2] Ex parte Lane, 11 Ves. 415.

[3] Holmes v. Wainewright, 1 Swanst. 20.

[4] [Under the act of 1898 a bond is required if the creditor applies to the court to take charge of the property of the alleged bankrupt prior to the hearing. § 3 e. See *infra*, §§ 466, 532.]

[5] Chapman v. Pickersgill, 2 Wils. 145; affirmed, *nom.* Brown v. Chapman, 3 Burr. 1418, and cases in following notes.,

[6] Cotton v. James, 1 B. & Ad. 128.

[7] See Bank of British North America v. Strong, 1 App. Cas. 307; Farley v. Danks, 4 E. & B. 493.

[8] Johnson v. Emerson, L. R. 6 Ex. 329.

[9] Quartz Hill Mining Co. v. Eyre, 11 Q. B. D. 674.

As in other cases of malicious prosecution, the action cannot be sustained unless the proceedings have been dismissed or discontinued;[1] but the dismissal does not *per se* prove want of probable cause.[2]

Want of probable cause is evidence of malice to be considered by the jury; but malice does not prove want of probable cause.[3]

In the case of a trader, special damage need not be averred, because it is so plain as to be held, as a matter of law, that a trader's credit will be injuriously affected by such a petition.[4]

It has been held that whether the petitioner creditor is a creditor in fact is a question which he must decide at his peril, and if he is not, there is, in law, a want of probable cause.[5] But this may be doubted. It would seem that, like many other points, this should depend upon what a man might reasonably believe.[6]

[1] Matthews *v.* Dickinson, 7 Taunt. 399; Whitworth *v.* Hall, 2 B. & Ad. 695; Metropolitan Bank *v.* Pooley, 10 App. Cas. 210.

[2] Hay *v.* Weakley, 5 C. & P. 361. See Cotton *v.* James, 1 B. & Ad. 128.

[3] Johnstone *v.* Sutton, 1 T. R. 493, 544; Sonneborn *v.* Stewart, 2 Woods, 599, Fed. Cas. No. 13,176.

[4] Metropolitan Bank *v.* Pooley, 10 App. Cas. 210.

[5] Sonneborn *v.* Stewart, 2 Woods, 599, Fed. Cas. No. 13,176.

[6] Metropolitan Bank *v.* Pooley, 10 App. Cas. 210.

CHAPTER V.

PREFERENCES.

§ 61. **Preferences at Law.** — The law creating the technical and conventional fraud known as a preference is a natural consequence of the working of a bankrupt or insolvent law, and was originally established by the courts, and afterwards adopted by the statutes. If all creditors are to be treated alike, a debtor cannot be permitted, after he becomes or expects to become insolvent, to treat them unequally. The common law, assuming that all men are and forever must be solvent, refuses to declare that it can be wrong to pay an honest debt. A debt is a valuable consideration, and a conveyance made *bona fide* to pay or secure a debt equally with one for a new consideration is valid, though the motive be to forestall a creditor who is proceeding to collect his debt by legal diligence.[1] Equity follows the law in this respect.[2] Even when a debtor admits his insolvency by assigning his property for the benefit of his creditors, he may, at common law and in equity, prefer such of them as he pleases.[3]

§ 62. **Preferences in Equity.** — The bankrupt laws have taught the injustice of preferences, and courts of equity will

[1] Holbird *v.* Anderson, 5 T. R. 235; Pickstock *v.* Lyster, 3 M. & S. 371; Wood *v.* Dixie, 7 Q. B. 892; Darvill *v.* Terry, 6 H. & N. 807; Vane *v.* Rigden, L. R. 5 Ch. 663; Middleton *v.* Pollock, 2 Ch. D. 104; Westbury *v.* Clapp, 12 W. R. 511; Brashear *v.* West, 7 Pet. 608; Brooks *v.* Marbury, 11 Wheat. 78; Hatch *v.* Smith, 5 Mass. 42; Rockwell *v.* Wilder, 4 Met. 556; National M. & T. Bank *v.* Eagle Sugar Refinery, 109 Mass. 38; Wilkes *v.* Ferris, 5 Johns. 335; Wintringham *v.* Lafoy, 7 Cow. 735; Wilt *v.* Franklin, 1 Binn. 502; Covanhovan *v.* Hart, 21 Penn. St. 495; Uhler *v.* Maulfair, 23 Penn. St. 481; York Cy. Bank *v.* Carter, 38 Penn. St. 446; Voorhees *v.* Blanton, 83 Fed. Rep. 234, 239; Eldridge *v.* Phillipson, 58 Miss. 270.

[2] Murray *v.* Riggs, 15 Johns. 571.

[3] Brinley *v.* Spring, 7 Maine, 241; Haven *v.* Richardson, 5 N. H. 113; Grover *v.* Wakeman, 4 Paige, 23, 11 Wend. 187; Ingraham *v.* Wheeler, 6 Conn. 277.

now, as far as they have the power, discountenance them by requiring creditors' bills, in certain classes of cases, to be brought for the benefit of all creditors of equal rank,[1] and by themselves distributing assets equally when once they obtain jurisdiction of a firm or a corporation or estate which is insolvent.[2]

In many of the States statutes have been passed requiring general assignments to be equal in their operation. But these laws are easily evaded by making partial and particular assignments; and besides, they cannot operate beyond the territory of the State which has enacted them. The need of a real and effectual equality has been one of the prevailing motives with Congress in passing a general bankrupt law.

There are also statutes of a more general character prohibiting preferences by limited partnerships and by corporations.

The most remarkable extension of the law is shown by the decisions of late in the United States, that when a corporation is about to stop payment it cannot lawfully prefer its directors, even though there is no bankrupt law governing the case. The reasoning of these decisions would equally invalidate preferences to shareholders. The subject is considered more fully in later sections of this work.[3]

§ 63. **Law of Preference in the United States and England.** — The law of preference has received a much more logical and complete development in the United States than in England. To exhibit this difference at a glance, I give the definition of a preference as generally received in each country.

In England (at least until some late decisions), a preference, voidable by assignees in bankruptcy, is where a debtor, in contemplation of a technical judicial bankruptcy, voluntarily and *mero motu* makes payment or gives security to an existing creditor without any demand on his part.[4]

[1] Warraker *v.* Pryer, 2 Ch. D. 109; Re Royle, 5 Ch. D. 540.

[2] Thompson *v.* Bennett, 6 Ch. D. 739, and cases cited in the argument.

[3] See *infra*, § 90.

[4] See Nunes *v.* Carter, L. R. 1 P. C. 342, 348, per *Lord Westbury*.

In the United States, a voidable preference exists where a debtor, being insolvent, or contemplating insolvency or bankruptcy, makes a payment, or gives security to a creditor with intent to give him a preference over the other creditors, and the preferred creditor knows of or has reason to believe the intent.

The difference between these definitions (and it is a very wide one in practice) is that under the former a positive technical bankruptcy must be in the mind of the debtor, and he must volunteer the payment or security; while by the latter an intent to prefer is the controlling consideration, and this may of course exist though the preference is not purely voluntary, and though a technical bankruptcy is not contemplated. In both countries bankruptcy must follow, or no case can be made out, for it is only against assignees in bankruptcy that any such fraud is possible.

One principal reason for the difference between the law in England and in America is that our statutes defined preferences as early as 1841, and were amended from time to time, and the courts followed the statutes. In England, the laws concerning insolvent debtors adopted a definition like that which the courts had given; and no bankrupt act defined preferences until 1869, and although that definition agrees with ours, the habits of the courts had become inveterate, and they imported into the word "preference" all the limitations of the old decisions.

Lately there have been some decisions which, if followed, may bring the English law into substantial conformity with ours.[1]

§ 64. **Worseley v. DeMattos; Alderson v. Temple.** — The law of preference, as I have said, was established by the courts. A single decision against such a preference was made in 1680;[2] but it was overlooked, and Lord Mansfield put the doctrine upon the footing which it maintained in England down to 1869. In Worseley *v.* DeMattos,[3] that eminent judge reviewed

[1] See *infra*, § 72.

[2] Hinton's Case, Freeman, 270.

[3] 1 Burr. 467.

the few decisions upon the subject, — except Hinton's Case, which he overlooked, — and declared that a mortgage by a debtor of his whole property to secure his bankers was fraudulent and an act of bankruptcy. The decision was put very distinctly and strongly upon the circumstance that all the debtor's effects were transferred. "There is a great difference," said Lord Mansfield, "between the conveyance of all and of a part. A conveyance of a part may be public, fair, and honest; as a trader may sell; so he may openly transfer many kinds of property by way of security; but a conveyance of all must either fraudulently be kept secret; or produce an immediate absolute bankruptcy."[1] And the last words of the opinion are: "The determination *here*, is upon the assignment of ALL."[2]

The distinction here so strongly insisted on, in language which is often quoted in the books, between the conveyance of all and of a part is unsound as a legal distinction, though as evidence of intent it has value. The true question is one of preference, which may be effected by a conveyance of part, and may not be by the conveyance of all, according to circumstances.

The next case is Alderson *v.* Temple,[3] which is considered the leading case on this subject. The assignees brought trover for a promissory note of £600, signed by A. and B., to the order of the bankrupts, and indorsed by them, and sent by mail to the defendant, a creditor. The jury found that the note was given in exchange for two notes of the bankrupts which had not been paid; that it was sent to the defendant by the bankrupts in contemplation of their insolvency and subsequent failure; and that it had not reached the defendant at the time of the bankruptcy. The associate justices found for the assignees on the ground that the transaction was not complete at the date to which the title of the assignees related. Lord Mansfield refused to rest his decision upon that point, though he admitted its validity, and held that the indorsement itself was fraudulent. After referring to Worseley *v.* DeMattos and

[1] 1 Burr. 478. [2] 1 Burr. 484. [3] 4 Burr. 2235.

other cases, he says, among other things: "If a bankrupt, in course of payment, pays a creditor, this is a fair advantage in the course of trade; or if a creditor threatens legal diligence, and there is no collusion; or begins to sue a debtor, and he makes an assignment of part of his goods." As to the case before him, "This was not done in a course of trade; for there never was any dealing between the parties in sending indorsed notes. There was no application made by the defendant. And it was done with a view to positive iniquity; for the bankrupts had received this note from Bryer and Everard for notes of the same value; and knowing they should become bankrupts the next day, to defeat Bryer and Everard of setting off their notes against it, indorse this note to another person. And there was no way of doing justice to Bryer and Everard, but supporting the claim now made by the assignees."

§ 65. **The English Doctrine.** — The judges, not excepting Lord Mansfield himself, appear to have been alarmed at their audacity in establishing this new fraud, and they proceeded to confine it within narrow and inadequate limits. They held that the course of trade must not be interfered with; and that it was usual in trade for a creditor to demand security for a debt whether due or not;[1] for a surety to do the like;[2] and for a creditor to receive payment in kind:[3] therefore the payment or security must be purely voluntary and unsolicited; any threat, promise, or simple demand will save it.[4] Then, that an intent to prefer could not exist, except it were the sole motive for the act, or, as a learned judge afterwards put it, the motive of the motive;[5] nor unless a technical bankruptcy was contemplated, for there could be no fraud intended upon

[1] Arbouin *v.* Hanbury, Holt N. P. 575, see reporter's note.

[2] Thompson *v.* Freeman, 1 T. R. 155; Cosser *v.* Gough, ib. 156, note *c.*

[3] Smith *v.* Payne, 6 T. R. 152; Hartshorn *v.* Slodden, 2 B. & P. 582; Crosby *v.* Crouch, 2 Camp. 165, 11 East, 256.

[4] Ex parte Scudamore, 3 Ves. 85; De Tastet *v.* Carroll, 1 Stark. 88; Doe *v.* Gillett, 2 C. M. & R. 579; Van Casteel *v.* Booker, 2 Ex. 691.

[5] Ex parte Griffith, 23 Ch. D. 69, per *Bowen, J.* [The preference must now be the dominant motive. Re Bell, 10 Morrell, 15; Re Clay, 3 Manson, 31; Re Eaton (1897), 2 Q. B. 16.]

a law whose operation was not present to the mind of the actor.[1]

§ 66. **Statutory Definitions.** — I have already said that preferences became a matter of statutory definition many years ago in the United States. They were defined in the insolvent debtor's acts in England as early as 7 Geo. IV., c. 57, but in substantial conformity with the judgment of the courts. The act of Congress of 1841 defined them as payments, etc., given in "contemplation of bankruptcy." Judge Story, who drew the act, held that this phrase had no technical meaning, but included an expectation of stopping payment and breaking up the trade;[2] but many able judges, and finally the Supreme Court, held that the expression had been adopted from the decisions in England, and must be controlled by them.[3] The law of 1841 was soon repealed, and the Legislature of Massachusetts made a statutory definition of preference which, with subsequent amendments, was much broader than that of the act of Congress of 1841, and was afterwards copied in that of 1867. The statute of 1869, in England, followed our law of 1867 either by design or coincidence. The act of Parliament of 1883 follows the law of 1869, excepting in one particular. I give below our law of 1867 and the English law of 1883.

Act of Congress, 1867, § 35, 14 Stats. 534: "If any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer,

[1] Morgan v. Brundrett, 5 B. & Ad. 289; Atkinson v. Brindall, 2 Bing. N. C. 225; Belcher v. Prittie, 10 Bing. 408; Belcher v. Jones, 2 M. & W. 258; Re Paine (1897), 1 Q. B. 122.

[2] Arnold v. Maynard, 2 Story R. 349, Fed. Cas. No. 561; Morse v. Godfrey, 3 Story 364, Fed. Cas. No. 9856; Hutchins v. Taylor, 5 Law Reporter, 289, Fed. Cas. No. 6953.

[3] Buckingham v. McLean, 13 How. 151.

or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited."

Bankruptcy Act, 1883, 46 & 47 Vict., c. 52, § 48: "(1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they come due from his own money in favor of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same . . . [become bankrupt] within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

"(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt."

The statutory definition, which since 1869 has been substantially alike in both countries, is broader than the older decisions in England. An intent to prefer, according to all analogy, may coexist with other motives; and a contemplation of insolvency is evidence of intent as well as a contemplation of technical bankruptcy.

§ 67. **No Particular Mode of Transfer necessary.** — The words of the statute must always govern. Some statutes have omitted to mention certain modes of giving a preference, as, in one case, a payment of money;[1] in another, giving a charge upon property already in the creditor's possession.[2] These omissions have always been corrected by the Legislature as soon as they were pointed out; and by the late act of Congress, any direct or indirect method of giving a preference may

[1] Wall v. Lakin, 13 Met. 167.

[2] Philps v. Hornstedt, L. R. 8 Ex. 26, 1 Ex. D. 62.

be assumed to come within the prohibition, such as a consignment to enable a factor to set off his existing demand,[1] a sale to a creditor for a like purpose,[2] a consolidation of actions by means of which an attachment of too long standing to be dissolved would apply to debts not before secured,[3] a judgment confessed or hastened with intent to prefer,[4] and any other means thus far brought to notice.

§ 68. **Being Insolvent.** — We have already seen that the definition of insolvency in the case of a trader is an inability to pay his debts as they come due in the ordinary course of his business.[5] If a trader is insolvent, and knows it, he is presumed to know that the consequence of paying or securing one or more creditors will probably be to prefer him or them. Some learned judges held that "being insolvent" was so absolute an expression that it was immaterial whether the debtor knew of his own insolvency or not.[6] But this is manifestly wrong, considered as a peremptory ruling of law. The whole clause is qualified by the "intent;" and no one can intend a consequence unless he knows the facts from which the consequence is to be inferred.[7] Of course, there is a very strong presumption indeed that a person is acquainted with his own affairs.[8]

§ 69. **Contemplation of Bankruptcy or Insolvency.** — Contemplation of bankruptcy means that the debtor expects or fears to become a bankrupt, either by filing his own petition or by the action of his creditors.[9] This contemplation may

[1] Burpee *v.* Sparhawk, 97 Mass. 342; Nudd *v.* Burrows, 91 U. S. 426.

[2] Smith *v.* McLean, 10 N. B. R. 260, Fed. Cas. No. 13,074.

[3] Samson *v.* Burton, 5 Ben. 343, Fed. Cas. No. 12,285.

[4] Re Baker, 14 N. B. R. 433, Fed. Cas. No. 763; Little *v.* Alexander, 21 Wall. 500; Webb *v.* Sachs, 15 N. B. R. 168, Fed. Cas. No. 17,325.

[5] *Ante*, § 41. As to meaning of insolvency under act of 1898, see *infra*, § 464.

[6] Haughey *v.* Albin, 2 Bond, 244, Fed. Cas. No. 6222; Rison *v.* Knapp, 1 Dillon, 186, Fed. Cas. No. 11,861; Hall *v.* Wager, 3 Biss. 28, Fed. Cas. No. 5951; Re Clarke, 10 N. B. R. 21, Fed. Cas. No. 2843.

[7] Curtis *v.* Leavitt, 15 N. Y. 9; Toof *v.* Martin, 13 Wall. 40; Rice *v.* Grafton Mills, 117 Mass. 228; Otis *v.* Hadley, 112 Mass. 100, that the debtor's belief is material; Re Locke, 1 Lowell, 293, Fed. Cas. No. 8439.

[8] See *infra*, § 73.

[9] Morgan *v.* Brundrett, 5 B. & Ad. 289; Gibson *v.* Muskett, 4 M. & G. 160.

be in the mind of a solvent debtor, because he may intend to commit an act of bankruptcy.

In some insolvent laws insolvency has the technical meaning of becoming an insolvent by judicial decree, and in such case contemplation of insolvency would have a similar meaning to contemplation of bankruptcy under a law called a bankrupt act.[1]

In this country it is now usual, in defining a preference, to refer to an actual state of insolvency rather than to a judicial determination of it; and, of course, in a bankrupt law, the word "insolvent" cannot refer to becoming a judicial insolvent, as there is no such thing possible.

As I have said, a debtor must contemplate a present or future state of bankruptcy or insolvency before he can possibly intend to prefer a creditor.[2]

§ 70. **Payment, Gift, etc.; Conveyance of all.** — When Worseley *v.* DeMattos[3] was decided, a fraud, to be an act of bankruptcy, must be a "fraudulent grant or conveyance;" and the courts held that there could not be a "grant or conveyance" excepting by deed.[4] In that case the conveyance was by deed, and was held to be an act of bankruptcy. By § 3 of 6 Geo. IV., c. 16, a trader could be made bankrupt not only if he had made a fraudulent grant or conveyance, but if he had "made any fraudulent gift, delivery, or transfer of any of his goods or chattels." Mr. Eden, who drew the statute,[5] said in his commentary upon it that "all those acts which have heretofore been determined to be fraudulent preferences will, under the latter of these provisions [gift, delivery, etc.], be henceforth considered as acts of bankruptcy."[6] This provision has been repeated in all subsequent statutes, and the text-writers have continued to assert that fraudulent preferences are acts of bankruptcy,[7] as, upon principle, they certainly

[1] Thoyts *v.* Hobbs, 7 Ex. 810.

[2] [Under the act of 1898 the debtor must be insolvent, not merely contemplating insolvency. See *infra*, § 466.]

[3] 1 Burr. 467; *ante*, § 64.

[4] 1 Jac. I., c. 15, § 2; Martin *v.* Pewtress, 4 Burr. 2477; Dutton *v.* Morrison, 17 Ves. 193.

[5] Per Swanston, *arg.* Ex parte Smith, 3 M. D. & De G. 144, 163.

[6] Eden, 25.

[7] Deacon on Bankruptcy, 76; Robson, 4th ed., 130, note *h*.

are;[1] but the courts of England have decided otherwise.[2] The statute of 1883, in England, has settled the matter by declaring in comprehensive terms that all fraudulent preferences shall be acts of bankruptcy.

The courts of England have continued to hold that a conveyance of a debtor's whole property is something different from a preference, and is either valid altogether or an act of bankruptcy.[3] At first they held that the fraud consisted in the fact that the deed, if acted on, would necessarily put an end to the debtor's trade. But a solvent trader has a right to put an end to his trade.[4] Until this was discovered, there were several decisions avoiding such an assignment, even when there was a present valuable consideration.[5]

But as an insolvent trader has an undoubted right to borrow money upon security, they next held that if the conveyance was upon a fresh consideration it was valid.[6] Both these distinctions are sound; but they come to this, that such a conveyance is voidable if it is a preference, and not otherwise.

In several statutes relating to insolvent debtors and to limited companies, a general definition has very properly included conveyances of all and of a part under a general description of preferences.[7] The courts, however, have in most instances continued to treat a conveyance of this sort as something distinct from a preference. Thus they hold that if, on the one hand, property of substantial value is omitted from the conveyance,[8] or, on the other, any assistance or promise of assistance is given to enable the debtor to continue his trade, the technical fraud has not been committed.[9] This last exception was reduced to an absurdity when it was held that forbearance

[1] *Ante*, § 61.

[2] Ex parte Stubbins, 17 Ch. D. 58; Ex parte Hodgkin, L. R. 20 Eq. 746.

[3] See Jones v. Harber, L. R. 6 Q. B. 77.

[4] Balme v. Hutton, 2 Y. & J. 101; Wedge v. Newlyn, 4 B. & Ad. 831; Porter v. Walker, 1 M. & G. 686.

[5] Butcher v. Easto, Doug. 295.

[6] See Administrator General v. Lascelles (1894), A. C. 135.

[7] Davies v. Acocks, 2 C. M. & R. 461; Gas Light Imp. Co. v. Terrell, L. R. 10 Eq. 168.

[8] Ex parte Chester, 1 Ch. D. 293, note; Ex parte Winder, 1 Ch. D. 290.

[9] Bittlestone v. Cooke, 6 E. & B. 296; Chase v. Goble, 2 M. & G. 930; The Thames, 63 L. T. 353.

of an old debt for a week was substantial assistance.[1] At one time it was held that the promise to make further advances must be one capable of enforcement;[2] but the latest decision is that if the promise is made in good faith it will save the conveyance.[3]

In the American law the only distinction between the conveyance of all and of a part is one of degree. The former is not an act of bankruptcy unless it is a preference; but as such a transfer to a pre-existing creditor is out of the ordinary course of trade, it will usually be found to be a preference.[4] And even when present value is given, the conveyance may be partly good and partly bad in equity; and though the intent to prefer may be clear, the creditor may not have cause to believe it, because he may not know that there are other creditors, or that the whole property is conveyed.[5] These points will be more fully considered in later sections.

§ 71. **Intent to prefer; Pressure.** — In England, as we have seen, it was held that an intent to prefer could not coexist with other motives, and that to avoid a preference the assignees must prove that it was purely voluntary.[6] This is an unsound definition of intent.[7] Thus, Story, J.: "No man can be permitted to aver his ignorance of the law as a qualification of his acts. On the contrary, every man is presumed to know the law, and he is bound to know what are the legal results of his acts; or, as Lord Ellenborough said in Newton *v.* Chantler, 7 East, 143, 'Every man must be presumed to contemplate the ordinary consequences of his own act at the time of the act done.'" The case here cited by Story, J., was one in which the whole property was transferred. The citation is appropriate; but in England acts of this class are not called preferences, and pressure does not avail.[8]

[1] Philps *v.* Hornstedt, L. R. 8 Ex. 26, 1 Ex. D. 62. This case was disapproved in Ex parte Cooper, 10 Ch. D. 313.

[2] Ex parte Foxley, L. R. 3 Ch. 515; Pennell *v.* Reynolds, 11 C. B. N. S. 709; Ex parte Dann, 17 Ch. D. 26.

[3] Ex parte Wilkinson, 22 Ch. D. 788.

[4] *Infra*, § 74, and Steel Co. *v.* Manchester Bank, 163 Mass. 252.

[5] Wadsworth *v.* Tyler, 2 N. B. R. 316, Fed. Cas. No. 17,032; Buffum *v.* Jones, 144 Mass. 29.

[6] *Supra*, § 65.

[7] Arnold *v.* Maynard, 2 Story R. 349, 353, Fed. Cas. No. 561.

[8] See *infra*, § 72.

"The intent to prefer," said Shaw, C. J., in the leading case of Denny *v.* Dana,[1] in which there was not only pressure, but an action brought and property attached, "is essential, but every person is presumed to intend the natural and probable consequences of his own acts; and if such acts do, in fact, . . . give a very large preference, it is competent for the jury to infer the intent. It does not rebut this intent to prove that the debtor has also another motive." So another learned judge says:[2] "When such a person is in circumstances to know that an assignment to some will defeat others, how can he be held innocent of a purpose to that effect?" Similar remarks will be found in many of the cases cited below; and the decisions come fully up to the *dicta*.[3]

It is, then, no defence that the creditor was in a hostile attitude, and induced the preference by promises, or by threats of civil or criminal proceedings. Such pressure may rather tend to show a knowledge that pressure was necessary.[4] In short, if the fact and the knowledge exist, the intent is presumed.[5]

§ 72. **Later Cases in England.** — The law of England appears to be undergoing a modification, by which it may be brought to resemble ours. In three late cases pressure has been held not a good answer to an imputation of intent.[6]

Soon after the act of 1869 was passed, the learned chief judge in bankruptcy said that the terms of the statute should be looked to in ascertaining and discovering a preference, and were a safer guide "than any scraps which may be collected

[1] 2 Cush. 160.

[2] McKenzie *v.* Garrison, 10 Rich. (S. Car.) 234, 238, per *Withers, J.*

[3] Warren *v.* Tenth Nat. Bank, 10 Blatch. 493, Fed. Cas. No. 17,202; Toof *v.* Martin, 1 Dillon, 203, Fed. Cas. No. 9167, 13 Wall. 40; Clarion Bank *v.* Jones, 21 Wall. 325; Webb *v.* Sachs, 15 N. B. R. 168, Fed. Cas. No. 17,325; Rison *v.* Knapp, 1 Dillon, 186, Fed. Cas. No. 11,861; Driggs *v.* Moore, 3 N. B. R. 602, Fed. Cas. No. 4083; Hyde *v.* Corrigan, 9 N. B. R. 466, Fed. Cas. No. 6968.

[4] Traders' Bank *v.* Campbell, 14 Wall. 87; Clarion Bank *v.* Jones, 21 Wall. 325; West Phila. Bank *v.* Dickson, 95 U. S. 180; Strain *v.* Gourdin, 2 Woods, 380, Fed. Cas. No. 13,521; Re Batchelder, 1 Lowell, 373, Fed. Cas. No. 1098; Giddings *v.* Dodd, 1 Dillon, 115, Fed. Cas. No. 5405; Webb *v.* Sachs, 15 N. B. R. 168, Fed. Cas. No. 17,325.

[5] Roberts *v.* Hill, 23 Blatch. 312.

[6] Ex parte Hall, 19 Ch. D. 580; Ex parte Griffith, 23 Ch. D. 69; Ex parte Hill, 23 Ch. D. 695. See Re Bell, 10 Morrell, 15.

as they may seem to serve out of any decision or expression of any judge."[1] In that case his decision was reversed,[2] but in Ex parte Griffith[3] a similar line of observation is adopted by the learned judges of the Court of Appeal. Jessel, M. R., said: "I am not going into a long discussion of the question whether the old law on the subject has been altered by § 92. If we are of opinion that the thing was done with a view of giving a preference to this creditor over the other creditors, why are we not to apply § 92?" Lindley, J.: "What we have to consider is the true construction of § 92. I emphatically protest against being led away from the words of the section by any argument that the standard which the Legislature has laid down is equivalent to the language of the old law. It may be so, but the language is different, and our duty is to construe that language," etc. Bowen, J., expresses the opinion that when the statute had for the first time defined a preference, the course pursued by the courts was very unfortunate. "The first thing which the courts did was to discuss the question whether the act had altered the old law and introduced an entirely new law, and they came to the conclusion that it had not altered the old law. Then began what I may call the old metaphysical exploration of the motives of people. . . . And so we have been drawn into questions of pressure and volition, and at length in the present case we have got into a discussion as to what is the motive of a motive," etc.

In this case the preference was avoided, though there was undoubted pressure. The reasoning in this case is precisely that of Shaw, C. J., in Denny *v.* Dana.[4] And it may be noted that under § 28 of the act of 1883, which makes an "undue preference" a reason for suspending or refusing the discharge, the word "preference" is made as broad in its meaning as it is in this country.[5]

[1] Ex parte Topham, L. R. 8 Ch. 616, note.

[2] Ex parte Topham, L. R. 8 Ch. 614.

[3] 23 Ch. D. 69; and see Ex parte Hall, 19 Ch. D. 580.

[4] 2 Cush. 160, 171. [It is no defence that the debtor's reasons for preferring the creditor were praiseworthy. Re Fletcher, 9 Morrell, 8; Re Vingoe, 1 Manson, 416. But it is not a preference if the payment is made under the belief of a legal obligation to make it. Williams, J., in the case last cited.]

[5] Re Skegg, 7 Morrell, 240.

Even in England pressure has never excused the conveyance of the whole property to less than all the creditors,[1] nor the payment or security of a creditor who has filed a petition in bankruptcy against the debtor,[2] though those are instances of preference, and not fraudulent under any other possible view.

And in some of the colonies, under laws not unlike that of England, pressure has been held not to negative the intent.[3] On the other hand, when the statute has referred to a "voluntary preference," it has been very properly held to embody the old decisions.[4]

In another late case in England, Re Saffery,[5] our law of preference was followed. There a stockbroker, being insolvent, paid over, under pressure, a considerable sum of money, but only about five-eighths of his whole property, in trust, for the payment of his creditors at the Stock Exchange, according to the rules of the association. It was held that the transaction was voidable by the assignees, "upon this broad, general, and universal principle that any *cessio bonorum* made by an insolvent on the eve of bankruptcy for the benefit of some creditors to the exclusion of others, or any scheme or arrangement made for the distribution of the assets by such person otherwise than according to the provisions of the bankruptcy law, is a plain and palpable fraud; . . . cases of assignment for the benefit of creditors, cases of fraudulent preference, are merely illustrations of this general principle which underlies the whole administration of the estates of insolvents in this country."

In a still later case this admirable decision was distinguished, and the official assignee of the Stock Exchange was not required to refund to the trustee in bankruptcy money which he had collected from some members and paid out to others under the rules of the association, all the credits hav-

[1] See Butcher *v.* Easto, Doug. 282; Newton *v.* Chantler, 7 East, 138; Ex parte Trevor, 1 Ch. D. 297.

[2] Rose *v.* Main, 1 Bing. N. C. 357.

[3] See Smith *v.* Carpenter, 12 Moore P. C. 101; Jones *v.* McKenzie, 13 Moore P. C. 1; Davidson *v.* Ross, 24 Grant, 22; National Bank of Australia *v.* Morris (1892), A. C. 287.

[4] Arnell *v.* Bean, 8 Bing. 87; Wainwright *v.* Clement, 4 M. & W. 385; Davies *v.* Acocks, 2 C. M. & R. 461.

[5] 4 Ch. D. 555; affirmed, *nom.* Tompkins *v.* Saffery, 3 App. Cas. 213.

ing arisen from stock contracts in the Exchange.[1] One point of distinction was that the official assignee of the board was under no obligation to the bankrupt, and therefore there was no privity between him and the trustee (assignee), and if his receipt of the money was unlawful, the remedy was against those who paid him. Another was that the fund itself was created by the rules of the board, and must be applied in accordance with these rules.

§ 73. **Intent to prefer, continued.** — If a debtor is insolvent, and knows it, his intent to prefer may be presumed. This idea is expressed in the epigrammatic *dictum* of a very able judge, that the intent to prefer may be inferred from the fact of preference.[2] This *dictum* is too much condensed.

Even when contemplation of bankruptcy is necessary, a known insolvency may be sufficient evidence of it.[3] In England, the intent is conclusively presumed when the whole property is given to less than all the creditors.[4] In this country it has been held that if the debtor is acquainted with the state of his affairs, and is insolvent, he can only rebut the presumption by proving reasonable ground for the expectation to retrieve his standing.[5] There is no doubt that the presumption is a disputable one,[6] and that ignorance, however improbable, is a rebuttal, if it is proved;[7] and there is no presumption that the creditor has knowledge of the debtor's insolvency.

§ 74. **Intent, continued; Usual Course of Business.** — In England, as we have seen, payment and security given in the

[1] Ex parte Grant, Re Plumbly, 13 Ch. D. 667.

[2] Beals *v.* Clark, 13 Gray, 18; Rison *v.* Knapp, 1 Dillon, 186, Fed. Cas. No. 11,861; Farrin *v.* Crawford, 2 N. B. R. 602, Fed. Cas. No. 4686; Driggs *v.* Moore, 3 N. B. R. 602, Fed. Cas. No. 4083.

[3] Aldred *v.* Constable, 4 Q. B. 674; Jones *v.* Howland, 8 Met. 377; Buckingham *v.* McLean, 13 How. 151.

[4] *Ante*, §§ 64, 72; and see Siebert *v.* Spooner, 1 M. & W. 714.

[5] Toof *v.* Martin, 1 Dillon, 203, Fed. Cas. No. 9167; 13 Wall. 40; Merchants' Bank *v.* Truax, 1 N. B. R. 545, Fed. Cas. No. 9451; Re Gregg, 4 N. B. R. 456, Fed. Cas. No. 5797; Hyde *v.* Corrigan, 9 N. B. R. 466, Fed. Cas. No. 6968.

[6] Bloodgood *v.* Beecher, 35 Conn. 469; Re Seeley, 19 N. B. R. 1, Fed. Cas. No. 12,628; Re Locke, 1 Lowell, 293, Fed. Cas. No. 8439; Re Randall, 3 N. B. R. 18, Fed. Cas. No. 11,551; Rice *v.* Grafton Mills, 117 Mass. 228; Buffum *v.* Jones, 144 Mass. 29; Leighton *v.* Morrill, 159 Mass. 271.

[7] Quinebaug Bank *v.* Brewster, 30 Conn. 559.

course of trade are protected.[1] In this country, intent is a question of fact; and while a payment in the ordinary course of trade will rarely be a preference, yet it may happen to be so in some cases.[2] On the other hand, an act done out of the usual course of the debtor's business is, by most of the statutes, and would be by decision, notice to the preferred creditor that something may be wrong.[3]

The course of business is a question of fact; but as a great many cases are decided in equity, the decisions of the courts have become precedents. To have a usual course of business a man must be in some business (though it need not be a trade, strictly so called), and the act must have some relation to his business. It has been held not to be out of the course of business of a trader to sell his dwelling-house,[4] nor of a railroad to mortgage its franchise and rolling-stock to secure all its unsecured creditors;[5] but it is so for a manufacturer to sell his raw materials,[6] for a wheelwright to mortgage his house, which is substantially his whole property, to secure a single existing creditor;[7] so of payment in something not money.[8] A payment after a general suspension is out of course, because the business has ceased to have due course,[9] or giving power to sell for a debt not due.[10] The most common cases are those in which a retail trader has sold or mortgaged his whole stock of goods, which is usually held to be out of due course,[11] though it is a question of fact in each case, as to the course of trade of the particular debtor, of which general usages in the same

[1] § 65. [A trader may pay his paper at maturity, as without this he could not continue in business. Re Clay, 3 Manson, 31; Re Eaton (1897), 2 Q. B. 16.]

[2] See Re Seeley, 19 N. B. R. 1, Fed. Cas. No. 12,628. [It is for the jury to say whether a transfer not in the usual course of business is a preference. Haas v. Whittier, 97 Cal. 411.]

[3] See the following sections.

[4] Pearson v. Goodwin, 9 Allen, 482.

[5] Re Union Pac. R. R. Co., 10 N. B. R. 178, Fed. Cas. No. 14,376.

[6] Schrenkeisen v. Miller, 9 Ben. 55, Fed. Cas. No. 12,480.

[7] Nary v. Merrill, 8 Allen, 451, as explained in 9 Allen, 482.

[8] Re Kingsbury, 3 N. B. R. 317, Fed. Cas. No. 7816.

[9] Markson v. Hobson, 2 Dill. 327, Fed. Cas. No. 9099.

[10] Robertson v. Todd, 31 Conn. 555.

[11] Walbrun v. Babbitt, 16 Wall. 577; Swan v. Robinson, 5 Fed. Rep. 287; Judson v. Courier Co., 15 Fed. Rep. 541; Killam v. Peirce, 153 Mass. 502; Tapscott v. Lyon, 103 Cal. 297; Chevalier v. Commins, 106 Cal. 580.

trade may be evidence, but not detached instances, unless they tend to show a general custom.[1]

§ 75. **Injury to General Creditors; Exempted Property; Liens.** — The assignees represent the rights of the general creditors, and unless the alleged preference is an injury to them there can be no recovery. Therefore one creditor cannot cause a preference to be set aside if the only effect will be to benefit him; nor can the assignee bring such an action if it will not benefit the general creditors.[2]

Thus, if the property conveyed to the defendant is exempted from liability for debts,[3] or would not go to the assignees, because it was the joint property of a firm, and only one partner is bankrupt;[4] or if the payment was a compromise for a less sum than will be paid in bankruptcy;[5] or a conveyance which merely completes a title to property of the debtor which the particular creditor might have enforced by virtue of a lien or charge, legal or equitable, or of a set-off;[6] or payment of a debt, which is privileged in bankruptcy, if there remain assets enough to pay all debts of the same rank;[7] or of a separate debt if the separate estate is solvent.[8] In cases of this character the transaction is not voidable by the assignees.

But if the exemption of property depends upon some act which the debtor has not done, as the setting aside of certain

[1] Otis *v.* Hadley, 112 Mass. 100; Buffum *v.* Jones, 144 Mass. 29.

[2] Willmott *v.* Celluloid Co., 31 Ch. D. 125, 34 Ch. D. 147; Ex parte Cooper, L. R. 10 Ch. 510.

[3] Re Henkel, 2 Sawyer, 305, Fed. Cas. No. 6362; Rayner *v.* Whicher, 6 Allen, 292; Grow *v.* Ballard, 2 N. B. R. 194, Fed. Cas. No. 5848; Schlitz *v.* Schatz, 2 Biss. 248, Fed. Cas. No. 12,459; Re Jones, 2 Dillon, 343, Fed. Cas. No. 7445; Rix *v.* Capitol Bank, 2 Dillon, 367, Fed. Cas. No. 11,869.

[4] Brickwood *v.* Miller, 3 Meriv. 279; Forsaith *v.* Merritt, 1 Lowell, 336, Fed. Cas. No. 4946; Amsinck *v.* Bean, 22 Wall. 395; Ex parte Smith, 3 M. D. & De G. 144.

[5] Re Hapgood, 2 Lowell, 200, Fed. Cas. No. 6044.

[6] Livingston *v.* Bruce, 1 Blatch. 318, Fed. Cas. No. 8410; Mavor *v.* Croome, 1 Bing. 261; Thompson *v.* Beatson, ib. 145; Goodwin *v.* Sharkey, 80 Penn. St. 149; Kemmerer *v.* Tool, 81 Penn. St. 467; Ex parte Hibernia Joint Stock Co., 14 Ir. Ch. 113 (that case is not law in Great Britain, but would be so here); Reber *v.* Gundy, 13 Fed. Rep. 53.

[7] Clark *v.* Sawyer, 151 Mass. 64.

[8] Hewitt *v.* Northrup, 75 N. Y. 506, a contrary decision in Judd *v.* Gibbs, 3 Gray, 539, is unsound in principle and unjust, and is virtually overruled by Clark *v.* Sawyer, 151 Mass. 64.

necessaries for the use of his family, and instead of setting them aside he assigns them, the assignment may be a preference.[1]

So a compromise with creditors is evidence of insolvency, and will be a preference unless the debtor is always ready and able to pay every creditor a proportionate amount, and, probably, unless his assets will pay as much;[2] and a conveyance to an execution creditor who had the right to sell the property, but the sale would have been an act of bankruptcy, is an evasion of the law.[3]

Property may be so settled by a valid arrangement when it is acquired that a class of creditors may have a lawful preference out of it, as where the by-laws of a corporation give the company a lien on the shares for debts due it from the members.[4]

So, of course, it can never be a preference to procure a debt to be paid or secured by a friend out of his own resources, or by his indorsement or guarantee of the debtor's promise, if the surety receives no indemnity from the debtor's property.[5]

§ 76. **Transfer for Value, etc.** — It is not a preference by a debtor, however insolvent, to sell, pledge, or mortgage the whole or any part of his property for a fair present value, if the money is not to be used to give a preference, or for some other illegal payment;[6] nor to exchange securities of equal value;[7] nor to compromise doubtful claims or give up doubtful enter-

[1] Rayner *v.* Whicher, 6 Allen, 292; Nash *v.* Farrington, 4 Allen, 157; Stevenson *v.* White, 5 Allen, 148. See La Point *v.* Blanchard, 101 Cal. 549, and Wyman *v.* Gay, 90 Maine, 36.

[2] Fernald *v.* Gay, 12 Cush. 596.

[3] Ex parte Pearson, L. R. 8 Ch. 667; Woodhouse *v.* Murray, L. R. 4 Q. B. 27; affirming L. R. 2 Q. B. 634; Ex parte Cooper, 10 Ch. D. 313.

[4] Hyde *v.* Woods, 2 Sawyer, 655, Fed. Cas. No. 6975, 94 U. S. 253.

[5] Hovil *v.* Pack, 7 East, 164; Ex parte Green, 1 Dea. & Ch. 230; Sharp *v.* Phila. Warehouse Co., 10 Fed. Rep. 379; Winslow *v.* Bliss, 3 Lans. 220; Winsor *v.* Kendall, 3 Story, 507, Fed. Cas. No. 17,886; Re Rogers, 8 Morrell, 243. With the last case compare Re Snyder, 8 Morrell, 127.

[6] Tiffany *v.* Boatman's Inst., 18 Wall. 375; Coxe *v.* Hale, 10 Blatch. 56, Fed. Cas. No. 3310; Catlin *v.* Hoffman, 2 Sawyer, 486, Fed. Cas. No. 2521; Bentley *v.* Wells, 61 Ill. 59; Re Morrison, 10 N. B. R. 105, Fed. Cas. No. 9839; Piper *v.* Baldy, 10 N. B. R. 517, Fed. Cas. No. 11,179. See Shears *v.* Goddard (1896), 1 Q. B. 406.

[7] Burnhisel *v.* Firman, 22 Wall. 170; Sawyer *v.* Turpin, 2 Lowell, 29, Fed. Cas. No. 12,410; 1 Holmes, 226, Fed. Cas. No. 12,409, 91 U. S. 114; Re Weaver, 9 N. B. R. 132, Fed. Cas. No. 17,307.

prises;[1] nor to return money or property advanced for the purpose of settling the debts, or any other specific purpose, which has failed of effect.[2] One application of the principle discussed in this section is that the assignees have no right to avoid a security if the only effect will be to benefit other secured creditors.[3]

§ 77. **No Defence that Creditor had Security of a Third Person.** — If the debtor pays or secures a creditor by money or property of his own, and thus his creditors are injured, it is no defence to an action by the trustee against the preferred creditor that the defendant had security upon the property of a third person, or had solvent indorsers or sureties for his debt.[4] The test is injury to the general creditors, not benefit to the defendant.

If the assignees avoid the preference, the creditor's rights against the third person will revive,[5] because he is the person actually preferred.

§ 78. **Not a Preference to complete a Transaction.** — It is not a preference if the debtor, though insolvent, completes a transaction begun before his failure, as, for example, by indorsing a note which he had pledged, or conveying goods or other property for which he had received the consideration; because the other party has never trusted him as a debtor, but only as an honest man to do a specific thing.[6]

[1] Knickerbocker Ins. Co. *v.* Comstock, 9 N. B. R. 484, Fed. Cas. No. 7879; Miller *v.* Barlow, L. R. 3 P. C. 733; Re Hamilton, 1 Fed. Rep. 800.

[2] Toovey *v.* Milne, 2 B. & A. 683; Moore *v.* Barthrop, 1 B. & C. 5.

[3] Ex parte Cooper, L. R. 10 Ch. 510; Darling *v.* Townsend, 5 Fed. Rep. 176.

[4] Groom *v.* Watts, 4 Ex. 727; Marshall *v.* Lamb, 5 Q. B. 115; Bartholow *v.* Bean, 18 Wall. 635; Lawrence *v.* Graves, 5 N. B. R. 279, Fed. Cas. No. 8138; Sage *v.* Wynkoop, 16 N. B. R. 363, Fed. Cas. No. 12,215.

[5] Pritchard *v.* Hitchcock, 6 M. & G. 151; Newington *v.* Levy, L. R. 5 C. P. 607; Petty *v.* Cooke, L. R. 6 Q. B. 790; Watson *v.* Poague, 42 Iowa, 582; National Bank of Australia *v.* Morris (1892), A. C. 287.

[6] Nickerson *v.* Baker, 5 Allen, 142; Post *v.* Corbin, 5 N. B. R. 11, Fed. Cas. No. 11,299; Re Perrin, 7 N. B. R. 283, Fed. Cas. No. 10,995; Nicholson *v.* Schmucker, 81 Md. 459; Williams *v.* Clark, 47 Minn. 53; Re McKay, 1 Lowell, 561, Fed. Cas. No. 323; Gattman *v.* Honea, 12 N. B. R. 493, Fed. Cas. No. 5271; Crowell *v.* Attis, 25 Conn. 301. [So it is not a preference to exchange within the time during which a trustee may upset the transaction a valid security for one given long before, which was void for a technicality. Re Tweedale (1892), 2 Q. B. 216.]

§ 79. **Creditor's Knowledge.** — The preferred creditor must have reasonable cause to believe the debtor insolvent, and to intend a preference.[1] In most cases a creditor who is paid or secured when he knows the debtor to be insolvent may be presumed to know that he intends a fraud on the act, that is, a preference.[2] But there have been some few cases in which a known insolvency has not been held to prove conclusively a knowledge of intended fraud; as where the creditor did not know there were any other creditors,[3] or was misled concerning them.[4] It has been said that knowledge of the fraudulent intent, now required to be proved,[5] is substantially the same as the reasonable cause to believe which the statute formerly made sufficient. But this cannot be admitted. It has been repeatedly held that cause to believe is not belief, though, of course, it may in most cases be sufficient evidence of belief. If one passes counterfeit coin, he cannot be convicted of knowledge of its character, unless he had such knowledge.[6] If one buys negotiable paper in good faith, and not knowing that it was stolen, he will hold it, whatever reasons for suspicion he may have had.[7] Where the statute gave an action against a preferred creditor if he had reasonable cause to believe his debtor's insolvency, and another statute debarred a preferred creditor from proving his debt if he had knowledge of the same fact, it was held that a judgment against the creditor in an action to recover the preference was not conclusive against the proof of his debt, because knowledge and reasonable cause to believe were not the same.[8]

§ 80. **Indirect Preferences.** — Our statutes avoid conveyances, etc., made with intent to give a preference "directly or in-

[1] Beals *v.* Quinn, 101 Mass. 262; Paige *v.* Loring, 1 Holmes, 275, Fed. Cas. No. 10,672. This case was taken to Washington, but settled by the parties before it was reached in the Supreme Court. Gibson *v.* Warden, 14 Wall. 244, 248, per *Swayne, J.*; Haskin *v.* James, 96 Cal. 258; Illinois Co. *v.* Bank, 149 Ill. 450; Act of 1898, § 60 b. See *infra*, § 523.

[2] *Infra*, § 99.

[3] Wadsworth *v.* Tyler, 2 N. B. R. 316, Fed. Cas. No. 17,032.

[4] Castle *v.* Lee, 11 N. B. R. 80, Fed. Cas. No. 2506.

[5] Act of June 22, 1874, § 11; 18 Stat. 180.

[6] 2 Bishop, New Criminal Law, § 605 (2).

[7] 1 Daniel, Negotiable Instruments, §§ 774 and 775 and cases.

[8] Howland *v.* Mosher, 12 Cush. 357.

directly." Thus, if one gives a warrant of attorney or a confession of judgment with intent that it shall be used by way of preference, the courts have called this an indirect mode of giving a preference.[1] So a conveyance to a third person who makes a preference to a creditor,[2] or a sale or mortgage to one who knows that the purchase-money will be used by the debtor to give a preference, is voidable by the trustees.[3] The real person to be benefited by such a transaction is the preferred creditor, and if he had notice of the fraudulent intent, it is against him that justice would seem to require the suit to be brought.[4] It has been said that the third person might, in such case, be permitted by the court to maintain an action against the preferred creditor in the name of the assignees.[5] And where a purchaser gave his note for goods so purchased from the debtor, and the latter indorsed the note to a creditor, by way of preference, and the promisor was obliged to surrender the goods to the assignees, he successfully resisted payment of the note which was held by a second indorsee who took it when overdue.[6]

§ 81. **Preference of Sureties.** — Indorsers, sureties, and other persons liable for the debts of the bankrupt are creditors, within the meaning of the law against preferences to pre-existing creditors. If, therefore, a payment is made or security given, either directly to a surety, or to a creditor with the privity of the surety, for the purpose of preferring the latter, and he has the requisite notice of the intent, and the other requisites concur, assignees may recover of him.[7] If, however, the surety

[1] Traders' Bank *v.* Campbell, 14 Wall. 87; Clarion Bank *v.* Jones, 21 Wall. 325; Re Sims, 19 N. B. R. 57, Fed. Cas. No. 12,889. See § 83.

[2] Gibson *v.* Dobie, 5 Biss. 198, Fed. Cas. No. 5394. See Priest *v.* Brown, 100 Cal. 626; Saunders *v.* Russell, 171 Mass. 74. As to indirect preferences under act of 1898, see *infra*, § 523.

[3] Crafts *v.* Belden, 99 Mass. 535; Ex parte Mendell, 1 Lowell, 506, Fed. Cas. No. 9418; Bucknam *v.* Goss, 13 N. B. R. 337, Fed. Cas. No. 2097; Devas *v.* Venables, 3 Bing. N. C. 400; Hall *v.* Haskell, 169 Mass. 291.

[4] White *v.* Bartlett, 9 Bing. 378; Gibson *v.* Dobie, 5 Biss. 198, Fed. Cas. No. 5394.

[5] Ex parte Mendell, 1 Lowell, 506, 509, Fed. Cas. No. 9418.

[6] Potter *v.* Belden, 105 Mass. 11.

[7] Ahl *v.* Thorner, 3 N. B. R. 118, Fed. Cas. No. 103; Sill *v.* Solberg, 6 Fed. Rep. 468, 10 Biss. 252; Smith *v.* Little, 9 N. B. R. 111, Fed. Cas. No. 13,072; May *v.* Le Claire, 18 Fed. Rep. 164. See *infra*, § 523.

is not party or privy to the transaction, he is not liable.[1] Recovery of the creditor is considered in § 80.

§ 82. **Suffering a Judgment to be obtained.** — It was held in respect to preferences, under the act of 1867, that the word "suffer" (judgment to be obtained) was qualified by the requirement of an intent on the debtor's part to prefer the creditor, and that one who merely permitted judgment against him to go by default, when he had no just defence to the action, could not be said to have such an intent, though he knew that the creditor would obtain an advantage over the general body of creditors by virtue of his judgment.[2]

This section should probably receive a similar construction.

If the debtor has aided in any way by word or act to cause an action to be brought, or to hasten the recovery of judgment, he procures it; and if he is insolvent, the act is a preference.[3] If he knowingly suffers judgment for a false or fictitious demand, it is fraudulent in the ordinary sense.

§ 83. **Confession of Judgment.** — In those States in which a judgment operates a lien upon the property of the judgment debtor, a confession of judgment, or a warrant of attorney will be a "security," and, if given and received as a preference, will be voidable by the assignees.

Such an act may also be an indirect conveyance of property or a "procuring" of its being taken, by way of preference, if the debtor knows that the creditor intends to put it in force by levy, whether the law gives a lien by judgment or only by levy or seizure.[4]

[1] Bean *v.* Laflin, 5 N. B. R. 333, Fed. Cas. No. 1172; Churcher *v.* Cousins, 28 U. C. Q. B. 540; Botham *v.* Armstrong, 24 Grant, 216.

[2] Wilson *v.* City Bank, 17 Wall. 473. [The law is otherwise under the act of 1898. See *infra*, § 466.]

[3] Little *v.* Alexander, 21 Wall. 500; Clarion Bank *v.* Jones, ib. 325; Beattie *v.* Gardner, 4 Ben. 479, Fed. Cas. No. 1195; Lane *v.* Haynes, 8 Law Reporter, 499; McKenty *v.* Gladwin, 10 Cal. 227; Sartwell *v.* North, 144 Mass. 188; s. c. 151 Mass. 142. See § 84.

[4] Hall *v.* Wallace, 7 M. & W. 353; Gore *v.* Lloyd, 12 M. & W. 479; Shawhan *v.* Wherritt, 7 How. 627; Buckingham *v.* McLean, 13 How. 151; Atkinson *v.* Purdy, Crabbe, 551, Fed. Cas. 616; Campbell *v.* Traders' Bank, 2 Biss. 423, Fed. Cas. No. 2370; 14 Wall. 87; Clarion Bank *v.* Jones, 21 Wall. 325; Claridge *v.* Kulmer, 1 Fed. Rep. 399; Darling *v.* Townsend, 5 Fed. Rep. 176.

§ 84. **No Preference by Judgment in invitum; Wilson v. City Bank.** — It was held by many of the courts that mere submission to an adversary judgment, by an insolvent debtor, might be a preference, the words "suffer his property," etc., being used in one part of the statute. But in Wilson *v.* City Bank [1] the Supreme Court held that the intent to prefer qualified the definition of a preference, and that no one could intend a preference by merely neglecting to defend an indefensible action; and that the argument which had prevailed in many cases, that an insolvent person was bound to go into bankruptcy, found no support in the statute.

§ 84 *a.* **Debtor aiding in procuring a Judgment.** — No act which is solely that of the creditor will make a judgment a preference, as where one reduced his claim to bring it within the jurisdiction of a court having summary proceedings.[2] If, however, the debtor does any act, however slight, to give his creditor an advantage through the forms of action and judgment, or by simply confessing judgment without service, or submitting to judgment for a debt not due; or gives a new note which enables the creditor to obtain a more speedy remedy; or agrees to consolidate several actions by which an attachment will apply to some demands which did not secure them before; or comes within the jurisdiction for the purpose of enabling the creditor to obtain service upon him; or, in short, aids in any way to forward the action of one creditor, or, with the creditor's consent, conceals the fact of it, — this is a procuring or suffering within the act.[3] And it would probably be held that a notice

[1] 17 Wall. 473. See s. c. 1 Dillon, 476, Fed. Cas. No. 16,842; Nat. Bank *v.* Warren, 96 U. S. 539; Re Runzi, 3 Fed. Rep. 790; Britton *v.* Payen, 7 Ben. 219, Fed. Cas. No. 1906; Van Alstyne *v.* Cook, 25 N. Y. 489; Varnum *v.* Hart, 119 N. Y. 101. [The law is otherwise under the act of 1898. See *infra*, § 466.]

[2] Witt *v.* Hereth, 6 Biss. 474, Fed. Cas. No. 17,921.

[3] Little *v.* Alexander, 21 Wall. 500; Samson *v.* Burton, 5 Ben. 348, Fed. Cas. No. 12,285; Partridge *v.* Dearborn, 2 Lowell, 286, Fed. Cas. No. 10,785; Loudon *v.* First Nat. Bank, 15 N. B. R. 476, Fed. Cas. No. 8525; Beattie *v.* Gardner, 4 Ben. 479, Fed. Cas. No. 1195; Parsons *v.* Caswell, 1 Fed. Rep. 74; Darling *v.* Townsend, 5 Fed. Rep. 176; Brown *v.* Jefferson Co. Bank, 9 Fed. Rep. 258; Lane *v.* Haynes, 8 Law Rep. 499; Balfour *v.* Wheeler, 15 Fed. Rep. 229; Sage *v.* Wynkoop, 16 N. B. R. 363, Fed. Cas. No. 12,215; Sartwell *v.* North, 144 Mass. 188; s. c. 151 Mass. 142.

by the debtor to his creditor to enter up or to enforce his judgment would make the levy voidable.[1]

§ 85. **Preferences in Respect to Time when given.** — A preference, though called fraudulent, is merely the payment or security of a just debt or liability, and all the statutes, at present, have established a limit of time before the actual technical bankruptcy; that is, before the filing of the petition, or before the adjudication, within which the preference must have been given, or it will be no fraud at all. In our late statute it was four months, and it was uniformly and necessarily held that a mere preference, the date of which was not disputed, could be assailed by the assignees only when the bankruptcy occurred within the prescribed period.[2] But many of the courts, in their desire to further the intent of the statute, were inclined to hold that the preference had its date when a mortgage was recorded, or when a right of levy or seizure was actually availed of, rather than when the right was acquired by the creditor.[3] These decisions, however, have been overruled.

The principle is clear, and was clearly pointed out by Curtis, J., in Buckingham *v.* McLean,[4] that an intent to prefer on the part of a debtor cannot be inferred from the action of some one else, such as a creditor who simply exercises his right of entering a judgment or recording a deed. If, therefore, a security is valid when given, but requires some seizure or record to vest the title, the creditor may put it in force at any time up to the day and hour of the technical bankruptcy;[5] so

[1] Hall *v.* Wallace, 7 M. & W. 353; Belcher *v.* Magnay, 12 M. & W. 102; Vogle *v.* Lothrop, 4 N. B. R. 439, Fed. Cas. No. 16,985; Singleton *v.* Butler, 2 B. & P. 283; Re Skegg, 7 Morrell, 240.

[2] Bean *v.* Brookmire, 1 Dillon, 25, Fed. Cas. No. 1168; Coggeshall *v.* Potter, 1 Holmes, 75, Fed. Cas. No. 2955; Hubbard *v.* Allaire Works, 7 Blatch. 284, Fed. Cas. No. 6814; Collins *v.* Gray, 8 Blatch. 483, Fed. Cas. No. 3013; Re Lane, 2 Lowell, 333, Fed. Cas. No. 8044; Sidener *v.* Klier, 4 Biss. 391, Fed. Cas. No. 12,843. As to a preference after a petition, see Ex parte Palmer, 10 Morrell, 252; Act of 1898, § 60 b.

[3] This is the law under the act of 1898. See *infra*, § 466.

[4] 13 How. 151, 169.

[5] Re Wynne, 4 N. B. R. 23, Fed. Cas. No. 18,117; Vogle *v.* Lathrop, 4 N. B. R. 439, Fed. Cas. No. 16,985; Clarke *v.* Iselin, 21 Wall. 360; Sawyer *v.* Turpin, 2 Lowell, 29, Fed. Cas. No. 12,410; 1 Holmes, 226, Fed. Cas. No. 12,409; 91 U. S. 114; Nat. Bank of

if a draft is drawn in good faith and sent to a creditor in the ordinary course of business, with no intent to prefer, the transfer is valid, though the creditor when he procured its acceptance had heard of the insolvency of the drawer.[1]

One distinguished judge, dissatisfied with these decisions, held that they did not apply to a case where the debtor was insolvent, and known to be so when the warrant of attorney was given, though that was more than the prescribed time before the bankruptcy.[2] This view agrees with a decision that where the fraud consists in procuring property to be taken, it is not complete until seizure.[3]

If the parties agree to keep a mortgage of chattels from the record, and renew it from time to time, to save the statutory requirement of a record within a fixed period, and for the very purpose of misleading creditors, there is evidence of an intent to prefer; and so of an agreement to give security when required.[4] Where the parties agreed that a conveyance should take effect for the benefit of the grantee at a certain time, if by that time the creditors had not accepted a compromise, the preference dated from that time.[5]

It was held by a very able judge that a preference was so far made a fraud, by the late act of Congress, that a concealment of it would prevent its being cured by the lapse of four months before the bankruptcy.[6] This decision was dissented from in a vigorous opinion,[7] which is more sound, for the bankruptcy of the debtor within four months was a condition precedent to its being a fraud.

§ 86. **Promise to give Security.** — In this country, a promise to give security at some future indefinite time, or when re-

Fredricksberg *v.* Conway, 14 N. B. R. 513, Fed. Cas. No. 10,037; Re Swenk, 9 Fed. Rep. 643; Gale *v.* Burnell, 14 L. J. Q. B. 340; Matthews *v.* Westphal, 48 Fed. Rep. 664.

[1] Re Baxter, 25 Fed. Rep. 700, 28 Fed. Rep. 452.

[2] Re Herpich, 15 N. B. R. 426, Fed. Cas. No. 6418.

[3] Belcher *v.* Gummow, 9 Q. B. 873.

[4] Ex parte Fisher, L. R. 7 Ch. 636.

[5] Haskill *v.* Frye, 14 N. B. R. 525, Fed. Cas. No. 6195; Heathman *v.* Rogers, 153 Ill. 143.

[6] Bank of Columbus *v.* Harris, 14 N. B. R. 510, Fed. Cas. No. 4595.

[7] Anibal *v.* Heacock, 2 Fed. Rep. 169. See Matthews *v.* Westphal, 48 Fed. Rep. 664.

quired, or a general covenant for further security, will not authorize the debtor to give, and the creditor to receive, security under circumstances which would make it a preference. In other words, the general and indefinite promise is disregarded.[1] A *bona fide* engagement to convey specific property, amounting to an equitable lien, will, however, be valid, and this is the test.[2]

In England, the courts of common law have often held that even a general and indefinite promise may validate security or payment which would otherwise be a preference, because it proves that the act was not purely voluntary (*mero motu*).[3] In equity, as we have seen, such a promise has been held invalid, if it was to be carried out only when insolvency was imminent.[4] In those cases, however, the whole property was mortgaged, which is not called a preference in England.

§ 87. **Ratification before Bankruptcy.** — Where an insolvent debtor, more than four months before his bankruptcy, of his own motion, and without the knowledge of his creditor, made a conveyance by way of preference, it was held that a ratification by the creditor within the four months did not relate

[1] Arnold *v.* Maynard, 2 Story R. 349, Fed. Cas. No. 561; Graham *v.* Stark, 3 Ben. 520, Fed. Cas. No. 5676; Ex parte Ames, 1 Lowell, 561, Fed. Cas. No. 323; Bank of Leavenworth *v.* Hunt, 11 Wall. 391; Brett *v.* Carter, 2 Lowell, 458, Fed. Cas. No. 1844; Barron *v.* Morris, 14 N. B. R. 371, Fed. Cas. No. 1055; Lloyd *v.* Strobridge, 16 N. B. R. 197, Fed. Cas. No. 8485; Burdick *v.* Jackson, 15 N. B. R. 318; Holmes *v.* Winchester, 135 Mass. 299.

[2] Re Jackson Mfg. Co., 15 N. B. R. 438, Fed. Cas. No. 7153; Ex parte Izard, L. R. 9 Ch. 271; Corn *v.* Sims, 3 Met. (Ky.) 391; Holmes *v.* Winchester, 133 Mass. 140; Holmes *v.* Winchester, 135 Mass. 299; Burn *v.* Carvalho, 4 Myl. & C. 690. See Ex parte Copeland, 3 Dea. & Ch. 199; Ex parte Carlon, 4 Dea. & Ch. 120; Ex parte Flower, ib. 449; Jombart *v.* Woollett, 2 M. & C. 389; Ex parte Barber, 3 M. D. & De G. 174; Ex parte Steward, ib. 265; Ex parte Imbert, 1 De G. & J. 152; Douglass *v.* Vogeler, 6 Fed. Rep. 53.

[3] Vacher *v.* Cocks, 1 B. & Ad. 145; Wilson *v.* Balfour, 2 Camp. 579; Gladstone *v.* Hadwen, 1 M. & S. 517; Belcher *v.* Prittie, 10 Bing. 408; Bills *v.* Smith, 6 B. & S. 314; Morris *v.* Venables, 15 W. R. 2; Harris *v.* Rickett, 4 H. & N. 1; Hunt *v.* Mortimer, 10 B. & C. 44; Bittlestone *v.* Cooke, 6 E. & B. 296; Harris *v.* Rickett, 1 H. & N. 1. [Re Harvey, 7 Morrell, 138, is a case where the whole property was not covered.]

[4] § 85.

back, and the act was avoided.[1] Where a debtor, at the time of using certain bonds belonging to his *cestui que trust*, substituted other securities in their place, and his act was ratified within four months of his bankruptcy, the substitution was held to be good;[2] but though the law of ratification is explained in the opinion, the decision turned rather upon the argument that the true owner might have claimed the substituted security from the assignees on the principle of Taylor *v.* Plumer.[3]

On the subject of preference to a seller of goods by returning them, see *infra*, § 359.

§ 88. **Attorneys and Counsel.** — In the United States it is the practice to permit a debtor to pay a reasonable retaining fee to his counsel to attend to his proceedings in bankruptcy, and this is not a preference.[4]

§ 89. **Preferences by Corporations.** — When corporations are made subject to the bankrupt law, they are, as debtors, subject to all the preceding rules in respect to preferences.[5]

There are some decisions that trading corporations, even without the authority of a statute, are bound by a stricter rule of equality than individual debtors, and may not lawfully assign their whole property for the benefit of their creditors, unless they provide for an equal distribution among them.[6] This is certainly a rule of natural justice; but it has no more application to a corporation than to an individual. Mr. Morawetz, in his valuable work on Corporations, argues ably in favor of this doctrine, as being not only just, but a fair deduction from the rule that the capital of a company is a trust fund

[1] See Strain *v.* Gourdin, 2 Woods, 380, Fed. Cas. No. 13,521; Re Kansas City Mfg. Co., 9 N. B. R. 76, Fed. Cas. No. 7610.

[2] Cook *v.* Tullis, 18 Wall. 332.

[3] 3 M. & S. 562.

[4] Re Rosenfeld, 2 N. B. R. 116, Fed. Cas. No. 12,057; Re Sidle, 2 N. B. R. 220, Fed. Cas. No. 12,844; Tufts *v.* Matthews, 10 Fed. Rep. 609; Parsons, Petr., 150 Mass. 343; Act of 1898, § 60 d; *infra*, § 523.

[5] Re Jaycox *et al.*, 13 Blatch. 70, Fed. Cas. No. 7238; Sawyer *v.* Hoag, 17 Wall. 610.

[6] Dabney *v.* Bank, 3 So. Car. 124; Consolidated Co. *v.* Varnish Co., 43 Fed. Rep. 204; Farmers' Co. *v.* San Diego Co., 45 Fed. Rep. 518; Sutton Mfg. Co. *v.* Hutchinson, 63 Fed. Rep. 496; 2 Morawetz, Corp., 2d ed., §§ 787, 788; Taylor, Corp., 4th ed., § 668, n. 1.

for its creditors.[1] This rule, however, only means that the assets shall not be distributed to shareholders to the injury of creditors, and has no bearing on the rights of creditors *inter sese*.[2] Accordingly, the decided weight of authority is that until proceedings are taken by bill or otherwise to wind up a corporation, it may prefer what honest creditors it will.[3] Thus Kent: "A corporation may also, like an individual, give preferences among creditors when honestly and fairly intended and done. This doctrine is well established in equity."[4]

§ 90. **Preference by Corporation of its Directors.** — It has been held in England that though pressure by a creditor relieves the debtor from all imputation of an intent to prefer him, the directors of a corporation cannot exert pressure upon the corporation, because the situation of the parties is not sufficiently adverse.[5] That was a case of the conveyance of the whole property to secure all the directors, but was very properly treated as a preference.

In this country, a corporation was bankrupt, and had secured one of its directors, but more than four months before the

[1] Morawetz, 1st ed., §§ 581, 582.

[2] Graham *v.* R. R. Co., 102 U. S. 148; Wabash Ry. Co. *v.* Ham, 114 U. S. 587; Fogg *v.* Blair, 133 U. S. 534, 541; Smith Purifier Co. *v.* McGroarty, 136 U. S. 237, 241.

[3] Catlin *v.* Eagle Bank, 6 Conn. 233; Smith *v.* Skeary, 47 Conn. 47; Town *v.* Bank of River Raisin, 2 Douglass, 530. Arthurs *v.* Comm. Bank, 9 Sm. & M. 394; Dana *v.* Bank of the United States, 5 W. & S. 223; Buell *v.* Buckingham, 16 Iowa, 284; Wilkinson *v.* Bauerle, 41 N. J. Eq. 635; Vail *v.* Jameson, ib. 648; Bergen *v.* Porpoise Fishing Co., 42 N. J. Eq. 397; Allis *v.* Jones, 45 Fed. Rep. 148; Ringo *v.* Biscoe, 13 Ark. 563; Reichwald *v.* Commercial Co., 106 Ill. 439; Planters' Bank *v.* Whittle, 78 Va. 737; Warner *v.* Mower, 11 Vt. 385; Whitwell *v.* Warner, 20 Vt. 425; Warfield *v.* Marshall Co., 72 Iowa, 666; Rollins *v.* Shaver Co., 80 Iowa, 380; Sargent *v.* Webster, 13 Met. 497; Glover *v.* Lee, 140 Ill. 102; Bank *v.* Salt Co., 90 Mich. 345; Foster *v.* Mullanphy Co., 92 Mo. 79; Prouty *v.* Prouty Co., 155 Pa. St. 112; Pyles *v.* Furniture Co., 30 W. Va. 123; Pond *v.* Framingham R. R. Co., 130 Mass. 194; Coats *v.* Donnell, 94 N. Y. 168; Sanford Tool Co. *v.* Howe, 157 U. S. 312, 318; Gottlieb *v.* Miller, 47 Ill. App. 588; Butler *v.* Land Co., 139 Mo. 467; Pairpoint Co. *v.* Watch Co., 161 Pa. St. 17. [It is doubtful which doctrine is supported by the greater weight of authority. See Taylor, Corp., 4th ed., § 668, and an article by Judge Thompson, "The Power of Corporations to prefer Creditors," 27 Am. L. Rev. 846. See also 5 Thompson, Corp., §§ 6492-6520, and note to Lyons Co. *v.* Perry Co., 22 L. R. A. 802.]

[4] 2 Kent Com. 315, note *g*.

[5] Gaslight Imp. Co. *v.* Terrell, L. R. 10 Eq. 168.

bankruptcy, and the act was, therefore, not a statutory preference; but the court held that it was voidable notwithstanding.[1]

This decision, though just, may be doubted, upon the authority of the cases above cited;[2] for if the company is under no obligation to treat all the creditors alike, independently of the bankrupt law, the directors are under no greater disability than other creditors, and a statutory preference must be shown in order to hold them. Two decisions of the Supreme Court were cited in this case, which afford some remote analogy, but their facts were widely different.[3] In connection with this case Mr. Morawetz cites Richards *v.* N. H. Ins. Co.,[4] where an assessment was voted to pay all the debts of the company, and the court held that it was a breach of duty on the part of the directors to pay their own debts first out of the avails of this assessment.

It has been distinctly held in England that directors of an insolvent company may be preferred, like any other creditors, unless they come within the prohibition of the statute.[5]

At common law, a partner may prefer his copartner at the expense of the creditors of both.[6]

In many of the States the statute law prohibits preferences by corporations, though permitting them to individuals.[7] So for national banks, by Rev. Stats., § 5242, there is a special law of preference which enables the receiver to avoid payments, etc., made after "an act of insolvency, or in contemplation thereof," even when the preferred creditor is not a party to and has no notice of the technical fraud. Payments of the banks' circulating notes are excepted, because they have priority by law.

[1] Bradley *v.* Farwell, 1 Holmes, 433, Fed. Cas. No. 1779. See Lippincott *v.* Shaw Co., 25 Fed. Rep. 577, and cases cited in 5 Thompson, § 6503; Howe *v.* Sanford Tool Co., 44 Fed. Rep. 231; Bradley *v.* Converse, 4 Cliff. 375, Fed. Cas. No. 1776; Corbett *v.* Woodward, 5 Sawy. 403, Fed. Cas. No. 3223; Adams *v.* Kehlor Co., 35 Fed. Rep. 433.

[2] *Supra*, § 89.

[3] Koehler *v.* Black River Falls Co., 2 Black, 715; Drury *v.* Cross, 7 Wall. 299; and see Jackson *v.* Ludeling, 21 Wall. 616.

[4] 43 N. H. 263.

[5] Poole, Jackson, & Whyte's Case, 9 Ch. D. 322.

[6] Rockwell *v.* Wilder, 4 Met. 556.

[7] 5 Thompson, Corp., § 6493.

§ 91. **Preference by Partners.** — Acts of preference by partners may be avoided in the same manner as those of individuals; and the assignees of the firm may avoid preferences to joint and to separate creditors.[1] If, however, only one of several partners is bankrupt, his assignee cannot avoid a preference given to a joint creditor out of joint funds, because he does not fully represent the joint creditors.[2] But if the preference was also a fraud on the solvent partner, as where the bankrupt partner fraudulently paid his separate debt out of joint funds, the latter may join with the assignee in an action against the preferred creditor, — one plaintiff relying on the fraud, and the other on the preference.[3]

Any contrivance by which a preference is given is voidable. Therefore, though insolvent partners have an undoubted right to dissolve their partnership, yet if they do so within the time limited by the statute, with intent to convert joint into separate assets, and thus work out a preference for the separate creditors through the marshalling adopted in bankruptcy, or if, with like intent, they give a joint promise for a separate debt, or *vice versa*, the trustees may avoid these acts as preferences, and distribute the assets without reference to them.[4]

It appears to have been ruled that, if one partner dies after the firm has given a preference, and the survivors become bankrupt, there is no power to recover the property illegally transferred.[5] This is a mistake. The surviving members rep-

[1] Hague *v.* Rolleston, 4 Burr. 2174; Burt *v.* Moult, 1 Cr. & M. 525; Craven *v.* Edmondson, 6 Bing. 734.

[2] Amsinck *v.* Bean, 22 Wall. 395; Fern *v.* Cushing, 4 Cush. 357, 358; Cunningham *v.* Munroe, 15 Gray, 471, 479; Forsaith *v.* Merritt, 1 Lowell, 336, Fed. Cas. No. 4946; Re Shepard, 3 Ben. 347, Fed. Cas. No. 12,754.

[3] Heilbut *v.* Nevill, L. R. 4 C. P. 354, 5 C. P. 478; Johnson *v.* Hersey, 10 Cent. L. J. 387; Burt *v.* Moult, 1 Cr. & M. 525.

[4] Ex parte Shouse, Crabbe, 482, Fed. Cas. No. 12,815; Collins *v.* Hood, 4 McLean, 186, Fed. Cas. No. 3015; Re Byrne, 1 N. B. R. 464, Fed. Cas. No. 2270; Re Waite, 1 Lowell, 207, Fed. Cas. No. 17,044; Phillips *v.* Ames, 5 Allen, 183; Re Johnson, 2 Lowell, 129, Fed. Cas. No. 7369; Ex parte Snowball, L. R. 7 Ch. 534; Re Parker, 6 Sawyer, 248; Re Lane, 2 Lowell, 333, Fed. Cas. No. 8044. See Wilson *v.* Robertson, 21 N. Y. 587; Menagh *v.* Whitwell, 52 N. Y. 146. See *infra*, § 468.

[5] Withrow *v.* Fowler, 7 N. B. R. 339, Fed. Cas. No. 17,919.

resent the firm, and may recover the joint assets from the representative of the deceased partner. It follows that they may be made bankrupt in respect to partnership acts, and that their assignee has all the rights of an assignee of the firm.[1]

§ 92. **No Preference by Exchange of Securities.** — If a creditor has a lien, mortgage, or pledge upon the property of the debtor, it is not a preference to take in exchange a fresh or different security of equal value after knowledge of the debtor's insolvency, though the first security had not been recorded; nor if the old security were believed by both parties, or by either, to be good, though not so, would there be an intent to prefer, or reasonable cause to believe such intent, as the case might be.[2]

At law, it may be that an old and good security would be held merged in the new and (in itself) bad one;[3] but this is never the case in equity.[4]

§ 93. **Trustees as Debtors.** — In England an insolvent trustee may make good a defalcation of the trust property, without committing a preference. The courts say that the relation of debtor and creditor does not exist in such a case.[5] In Massachusetts and under the late act of Congress such an act (the other requisites concurring) was held a preference.[6] The singularity of these decisions is apparent when we consider that in England such a defalcation causes a provable debt, while in Massachusetts it does not;[7] so that in the jurisdiction in which the *cestui que trust* is a creditor for the purpose of proof

[1] Ex parte Hall, De G. 332.

[2] Stewart *v.* Platt, 101 U. S. 731; Sawyer *v.* Turpin, 91 U. S. 114; s. c. 2 Lowell, 29 Fed. Cas. No. 12,410; 1 Holmes, 226, Fed. Cas. No. 12,409; Tiffany *v.* Lucas, 8 N. B. R. 49; Reber *v.* Gundy, 13 Fed. Rep. 53; Catlin *v.* Hoffman, 9 N. B. R. 342, Fed. Cas. No. 2521; Tiffany *v.* Boatman's Institution, 18 Wall. 375; Cook *v.* Tullis, 18 Wall. 332; Re Tweedale (1892), 2 Q. B. 216; Burnhisel *v.* Firman, 22 Wall. 170; Ex parte Packard, 1 Lowell, 523, Fed. Cas. No. 10,650; Vogle *v.* Lathrop, 4 N. B. R. 439, Fed. Cas. No. 16,985; Re York & Hoover, 3 N. B. R. 661, Fed. Cas. No. 18,138; Stevens *v.* Blanchard, 3 Cush. 169; Williams *v.* Coggeshall, 11 Cush. 442.

[3] See *infra*, § 95.

[4] See *infra*, § 95.

[5] Ex parte Stubbins, 17 Ch. D. 58; Ex parte Taylor, 18 Q. B. D. 295.

[6] Bush *v.* Moore, 133 Mass. 198; Gibson *v.* Dobie, 5 Biss. 198, Fed. Cas. No. 5394. See *infra*, § 466.

[7] *Infra*, §§ 179, 180.

he is not one for the purpose of preference, and in that in which he is not a creditor for proof he is one for preference.

Where a deed by its terms granted to a debtor an estate in his own right, it was held that he might make a valid declaration of trust after the trustees' title had accrued, if the fact corresponded with the declaration.[1]

§ 94. **Void means voidable by the Assignees.** — The statutes usually declare that the preference shall be void. This means voidable by the assignees. The assignees may ratify the act, either directly or by conduct inconsistent with its avoidance; as if they settle an account with the creditor, after knowledge or means of knowledge of the preference, and thereby treat it as valid, or bring *indebitatus assumpsit* for money received, instead of a special action on the case.[2] So the creditor may give a good title to a *bona fide* purchaser without notice,[3] but not to one who has notice.[4]

On the ground that the act of preference is only voidable, it was held in the leading case of Young *v.* Billiter,[5] that where chattels had been transferred to a creditor by way of fraudulent preference, and he had sold them before the assignees' title accrued, they could not sue him in trover. Some judges expressed a doubt whether he could be sued at all; but it is clear, and has now been decided, that special assumpsit would lie for the money.[6]

Very able judges have sometimes overlooked this distinction that preferences can only be avoided by the assignees. In sev-

[1] Gardner *v.* Rowe, 2 Sim. & Stu. 346.

[2] Smith *v.* Hodson, 4 T. R. 211; Brewer *v.* Sparrow, 7 B. & C. 310; Bartlett *v.* Walker, 65 Vt. 594; Sawyer *v.* Levy, 162 Mass. 190; Butler *v.* Hildreth, 5 Met. 49; Snow *v.* Lang, 2 Allen, 18; Harvey *v.* Varney, 98 Mass. 118. [A creditor may compel an assignee to set aside a preference in a clear case. Car *v.* Sears Co., 38 Atl. Rep. (R. I.) 1056.]

[3] Hoyt *v.* Shelden, 3 Bosworth, 267; Penniman *v.* Cole, 8 Met. 496; Burt *v.* Perkins, 9 Gray, 317; Gardner *v.* Lane, 9 Allen, 492; White *v.* Garden, 10 C. B. 919; Holbrook *v.* Basset, 5 Bosworth, 147; Re Pusey, 7 N. B. R. 45, Fed. Cas. No. 11,478; Zahm *v.* Fry, 9 N. B. R. 546, Fed. Cas. No. 18,198.

[4] Walbrun *v.* Babbitt, 16 Wall. 577.

[5] 8 H. L. 682 (reversing 6 E. & B. 1); and see Stevenson *v.* Newnham, 13 C. B. 285; Nicholson *v.* Gooch, 5 E. & B. 999; Brook *v.* Mitchell, 6 Bing. N. C. 349; Nixon *v.* Jenkins, 2 H. Bl. 135; Jones *v.* Fort, 9 B. & C. 764.

[6] Heilbut *v.* Nevill, L. R. 4 C. P. 354, 5 C. P. 478.

eral cases in Massachusetts it was held that a creditor might set aside the preference of another creditor by action, because the preference was contrary to the policy of the law, and void.[1] But these cases have been explained as depending upon a particular statute, afterwards repealed, and their reasoning was pronounced unsound.[2] So in a very learned opinion it was held, rightly, that a general assignment was a fraud on the act; but the unsound conclusion was reached that the grantee under such an assignment was not authorized to collect debts, there being no bankruptcy.[3] On this point the decision was properly reversed.[4]

It is entirely settled that no one but assignees can impeach a preference or any other act or deed which is fraudulent solely by virtue of the law of bankruptcy. If there is a bankruptcy, the right of the assignees is exclusive in all cases of fraud.[5] What I now mean is, that if there is no bankruptcy, there can be no impeachment at all of any act which is a fraud on the bankrupt law only.[6]

§ 95. **Effect of Avoidance; Merger.** — At law, a mortgage or security which is vitiated because a part of the consideration is illegal is voidable *in toto;* and when so avoided an earlier security or title for which it was exchanged, or which was merged in it, will not revive.[7] This rule may not hold when equitable defences are admitted in actions at law.

[1] Wyles *v.* Beals, 1 Gray, 233; Edwards *v.* Mitchell, ib. 239; Bowles *v.* Graves, 4 Gray, 117; Grocers' Bank *v.* Simmons, 12 Gray, 440; Stanfield *v.* Simmons, ib. 442.

[2] Nat. Mechanics' Bank *v.* Eagle Sugar Refinery, 109 Mass. 38.

[3] Shryock *v.* Bashore, 13 N. B. R. 481.

[4] s. c. 82 Penn. St. 159.

[5] See § 94, *ante*, and Priest *v.* Brown, 100 Cal. 626; Greenthal *v.* Lincoln, 67 Conn. 372.

[6] Seaman *v.* Stoughton, 3 Barb. Ch. 344; Harding *v.* Stevenson, 6 Har. & J. 264; Penniman *v.* Cole, 8 Met. 496; Burt *v.* Perkins, 9 Gray, 317; Gardner *v.* Lane, 9 Allen, 492; Wheeler *v.* Stone, 4 Gill, 38; Berkeley School *v.* Jarvis, 32 Conn. 412; Keane *v.* Goldsmith, 14 La. An. 349; Whitworth *v.* Gaugain, 3 Hare, 416; Triebert *v.* Burgess, 11 Md. 452; Johnson *v.* Osenton, L. R. 4 Ex. 107; Nunn *v.* Wilsmore, 8 T. R. 521; Meux *v.* Howell, 4 East, 1; Gardner *v.* Gambrill, 86 Md. 658. See *infra*, § 466.

[7] Denny *v.* Dana, 2 Cush. 160; Blodgett *v.* Hildreth, 11 Cush. 311; Paine *v.* Waite, 11 Gray, 190; Forbes *v.* Howe, 102 Mass. 427; Re Jordan, 9 N. B. R. 416; Re Wynne, Chase, 227, Fed. Cas. No. 18,117; Goodrich *v.* Wilson, 119 Mass. 429; Bucknam *v.* Goss, 13 N. B. R. 337, Fed. Cas. No. 2097.

In equity a good title will not merge in a bad one. Therefore if an old mortgage is given up in exchange for a new one, which is in itself a voidable preference, the creditor may still hold under the former; and so if the new mortgage is bad as to certain additional chattels covered by it, he may hold those which were embraced in the old mortgage.[1] So rights of dower and homestead, though released by the wife in the course of a voidable transaction, will revive when it is avoided.[2] So a mortgage which is partly for an old debt and partly for a present advance, will be good to the extent of the latter, though set aside as to the former.[3]

There may be positive fraud by the bankrupt or by his wife, that is, fraud at common law, which will estop them from claiming a benefit when the conveyance is avoided by creditors.[4] So if the preferred creditor is concerned in acts which are fraudulent at common law as well as under the bankrupt law, or if a preference is deliberately contrived under the forms of law, he will not be permitted to qualify his wrong-doing and assert an older title. Thus, in Traders' Bank *v.* Campbell,[5] a banking company had on deposit a sum which they might have set off against the debt of the insolvent depositor; but as this sum was small, and they wished to obtain a preference, they contrived with the debtor an attachment and seizure of this fund and of other property. When the seizure was set aside the court refused to permit them to reassert the right of set-off.

Some cases are reported in which a debtor in failing circumstances contrived with a creditor that the former should buy

[1] Avery *v.* Hackley, 20 Wall. 407; Re Kahley, 4 N. B. R. 378, Fed. Cas. No. 7593; Burnhisel *v.* Firman, 22 Wall. 170; Ex parte Harvey, 3 Dea. 547, 4 Dea. 52, Mont. & Ch. 261; Whiston *v.* Smith, 2 Lowell, 101 Fed. Cas. No. 17,523; Barron *v.* Morris, 14 N. B. R. 371, Fed. Cas. No. 1055; Brett *v.* Carter, 2 Lowell, 458, Fed. Cas. No. 1844; White *v.* Gainer, 2 Bing. 23.

[2] Re Montgomery, 12 N. B. R. 321, Fed. Cas. No. 9732; Ex parte Mutton, L. R. 14 Eq. 178; Ex parte Hodgkin, ib. 746; Ex parte Harris, L. R. 19 Eq. 253.

[3] Cox *v.* Wilder, 2 Dillon, 45, Fed. Cas. No. 3308; Smith *v.* Kehr, 7 N. B. R. 97, 2 Dillon, 50, Fed. Cas. No. 13,071; Fisher *v.* Henderson, 8 N. B. R. 175, Fed. Cas. No. 4820; Corbett *v.* Woodward, 5 Sawyer, 403, Fed. Cas. No. 3223.

[4] Re Graham, 2 Biss. 449, Fed. Cas. No. 5660; Keating *v.* Keefer, 5 N. B. R. 133, Fed. Cas. No. 7635.

[5] 14 Wall. 87.

goods of third persons on credit, and turn them over at once to the latter by way of preference. The assignees recovered of the creditor the value of the goods, though the fraud was really perpetrated on the seller.[1] The court was so indignant with the fraud that they disregarded this point.

§ 96. **Courts in which Preference may be recovered.** — Under the act of 1867 the courts of the State and of the United States had full concurrent jurisdiction of all suits to avoid preferences. In some States it was held that the law of preference was penal, and that the courts of the State would not lend their assistance to recover penalties imposed by a federal law.[2] These decisions were unsound. The law is not penal; it merely gives a title to assignees to recover for the general good of creditors property which has been diverted from the assets.[3] When a law of Congress has created a right or title, the State courts are bound to enforce it, unless Congress has given exclusive jurisdiction to the courts of the United States.[4] On the other hand, the assignees may sue a creditor or a sheriff in the federal courts for goods or money held or obtained by means of a judgment which was a preference, though they might have applied in a summary way to the State courts having possession of the fund.[5]

The remedy to set aside a deed or conveyance, or to recover anything except a mere payment of money, is, in the courts of the United States and of England, cognizable in equity, concurrently with the courts of law.[6] Nearly all the cases here

[1] Martin *v.* Pewtress, 4 Burr. 2477; Ex parte Reader, L. R. 20 Eq. 763. See Nudd *v.* Burrows, 91 U. S. 426; Sage *v.* Wynkoop, 16 N. B. R. 363, Fed. Cas. No. 12,215.

[2] Bingham *v.* Claflin, 7 N. B. R. 412; Voorhies *v.* Frisbie, 25 Mich. 476. For the jurisdiction of State courts under the act of 1898, see *infra*, § 486.

[3] Cook *v.* Waters, 9 N. B. R. 155; Tinker *v.* Van Dyke, 14 N. B. R. 112, Fed. Cas. No. 14,058.

[4] Otis *v.* Hadley, 112 Mass. 100; Rohrer's Appeal, 62 Penn. St. 498.

[5] Traders' Bank *v.* Campbell, 14 Wall. 87; Claflin *v.* Houseman, 93 U. S. 130.

[6] See Hayward *v.* Dimsdale, 17 Ves. 111; Pratt *v.* Curtis, 2 Lowell, 87, Fed. Cas. No. 11,375; Sill *v.* Solberg, 6 Fed. Rep. 468; Harmanson *v.* Bain, 15 N. B. R. 173, Fed. Cas. No. 6072, and cases cited; Bean *v.* Brookmire, 1 Dillon, 151, Fed. Cas. No. 1169, 2 Dillon, 108, Fed. Cas. No. 1170; Verselius *v.* Verselius, 9 Blatch. 189, Fed. Cas. No. 16,925; Shrenkeisen *v.* Miller, 9 Ben. 55, Fed. Cas. No. 12,480.

cited from those courts were brought in equity, — generally, to be sure, without objection. In Massachusetts and some other States there is no remedy in equity,[1] unless the rights of more than two distinct parties are involved, or there is some other special reason for applying to that jurisdiction.[2] An objection of this sort must be taken before final hearing.[3]

§ 97. **Form of Action; Damages.** — In England until the statute of 1883 a preference was held not to be an act of bankruptcy, and therefore the title of the assignees did not accrue by relation; and the doctrine of relation does not obtain in this country. For these reasons, and because the transfer of chattels or other property to a creditor by way of preference is valid between the parties, it was held, in a case which was very thoroughly considered, that where a creditor had taken a transfer of goods by way of preference, and had sold them before the title of the assignees accrued, he was not liable in trover,[4] for the disposition of the goods by him was not a conversion at the time it was made; and, of course, if the goods remained in the creditor's possession, he was not liable in trover until demand and refusal.[5]

The same reasoning might seem to apply in this country; but it has been held that though there is no relation of the title, yet a preference is an inchoate fraud, which becomes perfect by the happening of bankruptcy within the prescribed time, and that thereafter the assignees may maintain trover without a demand.[6] Assignees have recovered the value of the property or the money, with interest from the time of the preference, which involves nearly the same question. There is no doubt that a special action on the case will lie, with or without

[1] Woodman *v.* Saltonstall, 7 Cush. 181; Clark *v.* Jones, 5 Allen, 379.

[2] Hubbell *v.* Currier, 10 Allen, 333; Sherman *v.* Fitch, 98 Mass. 59.

[3] Dearth *v.* Hide & Leather Bank, 100 Mass. 540.

[4] Young *v.* Billiter, 8 H. of L. 682.

[5] Nixon *v.* Jenkins, 2 H. Bl. 135; Brook *v.* Mitchell, 6 Bing. N. C. 349; Newnham *v.* Stevenson, 10 C. B. 713, 13 C. B. 285; Nicholson *v.* Gooch, 5 E. & B. 999; Jones *v.* Fort, 9 B. & C. 764.

[6] Tapley *v.* Forbes, 2 Allen, 20; Foster *v.* Hackley, 2 N. B. R. 406, Fed. Cas. No. 4971.

a demand; and after demand for the money, if the goods were sold before bankruptcy, assumpsit can be maintained.[1]

On the question of damages, however, it is to be noted that our statutes usually provide that the assignees may recover the property or its value, and that the creditor may surrender his preference. Taking these provisions together, it would seem that the damages should not accrue until the assignees or the creditor had elected. If the creditor surrenders the very property, or cancels the mortgage, it will be very difficult to maintain that he is liable for something more.

§ 98. **Evidence.** — Any statements or admissions of the debtor, his books of account, his dealings, or his schedules in bankruptcy, are evidence on the issue of his insolvency;[2] but upon that of the creditor's knowledge, such admissions to be admissible must have been made before the time of the alleged preference,[3] unless the fraud was so contrived between them as to amount to a conspiracy.[4] So statements of the debtor, favorable to the creditor, made after the act, cannot be admitted.[5]

It has been often ruled that the denial by the debtor or the creditor upon the trial, that he had the requisite knowledge of the insolvency or the intent, is of very little value, not only by reason of bias, but also by the readiness with which one may deceive one's self upon matters of belief and intent.[6] It was even held in Massachusetts that a question to the creditor when he is a witness, as to his knowledge or belief of the debtor's insolvency, is inadmissible, because the statute made "reasonable

[1] Marks *v.* Feldman, L. R. 5 Q. B. 275; Farrow *v.* Mayes, 18 Q. B. 516; Biffin *v.* Yorke, 5 M. & G. 428.

[2] Holbrook *v.* Jackson, 7 Cush. 136; Bartlett *v.* Decreet, 4 Gray, 111; Pettee *v.* Coggeshall, 5 Gray, 51; Marsh *v.* Hammond, 11 Allen, 483; Re Cowles, 1 N. B. R. 280; Bicknell *v.* Mellett, 160 Mass. 328.

[3] Simpson *v.* Carleton, 1 Allen, 109 (overruling on this point Heywood *v.* Reed, 4 Gray, 574).

[4] O'Niel *v.* Glover, 5 Gray, 144; Nudd *v.* Burrows, 91 U. S. 426.

[5] Bicknell *v.* Mellett, 160 Mass. 328; but see English cases cited by *Holmes, J.*

[6] Graham *v.* Stark, 3 Ben. 520, Fed. Cas. No. 5676; Oxford Iron Co. *v.* Slafter, 13 Blatch. 455, Fed. Cas. No. 10,637; Scammon *v.* Cole, 3 N. B. R. 393, Fed. Cas. No. 12,438; Warren *v.* Tenth Nat. Bank, 10 Blatch. 493, Fed. Cas. No. 17,202.

cause to believe" the material thing.[1] This is too refined. The question is whether the debtor was insolvent and the creditor knew it; and though the statute made means of knowledge the equivalent of knowledge, in order to prevent a wilful ignorance, yet the knowledge itself would be conclusive; and as the creditor could undoubtedly be asked in cross-examination whether he knew the state of the debtor's affairs, he may be asked it in chief. Otherwise the creditor against whom certain causes of belief are shown is confined to a refutation of these particulars, when an explanation of the whole state of the case would clearly show his innocence. And so it was often ruled in the courts of the United States.

§ 99. **Evidence of Reasonable Cause of Belief.** — All facts which tend to show that the creditor, as a reasonable man, should have suspected the debtor's insolvency are evidence of reasonable cause to believe it; and cause to believe insolvency proves cause to believe the intent to prefer.[2] Thus, as we have already seen, the unusual character of the transaction is such evidence;[3] so the debtor's habits;[4] the general character of the business, as profitable or otherwise, at the time, in the experience of others in the same trade;[5] any statements made by him at or before the act, for or against his insolvency;[5] his general reputation in the community for solvency or insolvency;[6] and the apparent paradox is true that while the necessity for pressure has a tendency to prove cause of belief,[7] so the voluntary character of the transaction may have the same effect, if the debt is not due;[8] so, the act being a statutory fraud, any circumstances of contrivance, or collusion, or secrecy. This is

[1] Coburn *v.* Proctor, 15 Gray, 38; Forbes *v.* Howe, 102 Mass. 427.

[2] Grant *v.* Nat. Bank, 17 N. B. R. 498; Barbour *et al. v.* Priest, 19 N. B. R. 518; Small *v.* Robinson, 5 Fed. Rep. 287.

[3] *Ante*, § 74, and Matthews *v.* Chaboya, 111 Cal. 435.

[4] Simpson *v.* Carleton, 1 Allen, 109.

[5] Marsh *v.* Hammond, 11 Allen, 483.

[6] Bartlett *v.* Decreet, 4 Gray, 111. See Killam *v.* Peirce, 153 Mass. 502; Lee *v.* Kilburn, 3 Gray, 594; Heywood *v.* Reed, 4 Gray, 574; Metcalf *v.* Munson, 10 Allen, 491; Foster *v.* Hackley, 2 N. B. R. 406, Fed. Cas. No. 4971; Re Cowles, 1 N. B. R. 280, Fed. Cas. No. 3297; Post *v.* Corbin, 5 N. B. R. 11, Fed. Cas. No. 11,299; Brooks *v.* Thomas, 8 Md. 367.

[7] See Re Forsyth & Murtha, 7 N. B. R. 174, Fed. Cas. No. 4948.

[8] Merchants' Bank *v.* Cook, 95 U. S. 342.

true, even in England, on the question of the voluntary character of the act.[1] So preferences by the debtor at or near the same time are evidence of intent, as in other cases of fraud.[2]

§ 100. **Knowledge of Creditor's Attorney; Hoover v. Wise.** — Knowledge or reasonable cause of belief on the part of the creditor's attorney may, of course, in most cases, be imputed to the creditor; and intent to prefer on the part of the debtor's attorney may be imputed to him.[3] In one exceptional case the Supreme Court held that the knowledge of a sub-agent did not bind the principal.[4] The vigorous dissenting opinion in this case and its peculiar circumstances make it of little value as a precedent. If, however, the transaction is not the mere payment of a debt, but a borrowing by the debtor upon security, for the purpose of preferring a third person, the knowledge of the agent of the lender will not always be the knowledge of the principal; as where the agent is himself the preferred creditor, and is, therefore, interested to conceal the facts from his principal, the lender.[5]

§ 101. **Fox v. Gardner.** — It was held by the Supreme Court, in Fox *v.* Gardner,[6] that where a debtor of the insolvent had accepted an order, not negotiable, in favor of a creditor of the insolvent, and the jury found that all three parties knew that a preference was intended to the creditor, the assignees might recover the debt from the original debtor in an action at law, notwithstanding his acceptance of the order. If the defendant had objected that the remedy was in equity, he must have prevailed, because the judgment in this case would not bind the creditor, who was not a party, and the defendant might have been obliged to pay the acceptance by the verdict of another jury.[7]

[1] Robson, 7th ed., p. 163.

[2] Lynde *v.* McGregor, 13 Allen, 172.

[3] Brown *v.* Jefferson County Bank, 9 Fed. Rep. 258; Rogers *v.* Palmer, 102 U. S. 263; Bush *v.* Moore, 133 Mass. 198; Sartwell *v.* North, 144 Mass. 188. See *infra*, § 523.

[4] Hoover *v.* Wise, 91 U. S. 308, affirming Hoover *v.* Greenbaum, 61 N. Y. 305. Compare Rogers *v.* Palmer, 102 U. S. 263; Sartwell *v.* North, 144 Mass. 188.

[5] Dillaway *v.* Butler, 135 Mass. 479, citing Wilde *v.* Gibson, 1 H. L. Cas. 605; Cave *v.* Cave, 15 Ch. D. 639.

[6] 21 Wall. 475. See McGregor *v.* Hume, 28 U. C. Q. B. 380.

[7] See Holmes *v.* Woodworth, 6 Gray, 324; Potter *v.* Belcher, 105 Mass. 11, 15, per *Wells, J.*

§ 102. **Sale by Assignees with or without giving Right to set aside Preference.** — The assignees may not only set aside a mortgage or other similar security which is voidable as a preference, but if they give notice of their election to avoid it, they may sell the equity of redemption, together with a right in the purchaser to contest the incumbrancer's title.[1] If, however, they fail to give such notice, and simply sell the estate, subject to the incumbrance, the purchaser will not succeed to their rights, but is estopped;[2] for the assignees may, after the sale, recover the value of the mortgage from the preferred creditor, which would, of course, affirm his title to the mortgage itself.

§ 103. **Preference to Petitioning Creditor.** — In some statutes it is provided that a payment to a petitioning creditor whereby he may obtain more than other creditors shall be void. There is, however, no necessity for such a clause, because the petitioning creditor admits by his petition knowledge of the insolvency, and is acting as a sort of trustee for the benefit of creditors generally.[3] It is for this last reason that other creditors are admitted to intervene in support of the petition.[4]

§ 104. **Province of the Jury.** — All questions of insolvency, contemplation, intent, reasonable cause to believe, are questions of fact, which are for the jury if the case is tried at law. It is error to rule them as matter of law, unless the case is so clear that a verdict contrary to the ruling could not be supported.[5]

[1] Gibbs *v.* Thayer, 6 Cush. 30; Dwinel *v.* Perley, 32 Maine, 197; Freeland *v.* Freeland, 102 Mass. 475.

[2] Tuite *v.* Stevens, 98 Mass. 305; Brewer *v.* Hyndman, 18 N. H. 9; Bean *v.* Brackett, 34 N. H. 102.

[3] Carter *v.* McLaren, L. R. 2 Scotch App. 120; Ex parte Thompson, 1 Ves. Jr. 157; Davis *v.* Holding, 1 M. & W. 159; Ex parte Boss, L. R. 18 Eq. 375; Ex parte Jay, L. R. 9 Ch. 133; Rose *v.* Main, 1 Bing. N. C. 357; Ex parte Furber, 6 Ch. D. 181; Re Williams, 1 Lowell, 406, Fed. Cas. No. 17,703; Claflin *v.* Torlina, 11 N. B. R. 521; Ledbetter *v.* Salt, 4 Bing. 623; Ex parte Paxton, 15 Ves. 461; Ex parte Browne, ib. 472; Muskett *v.* Drummond, 10 B. & C. 153; Ellis *v.* Russel, 10 Q. B. 952; Foster *v.* Goulding, 9 Gray, 50.

[4] *Supra*, § 49.

[5] Fidgeon *v.* Sharpe, 5 Taunt. 539; Gibson *v.* Muskett, 4 M. & G. 160; Aldred *v.* Constable, 4 Q. B. 674; Cook *v.* Rogers, 7 Bing. 438; Belcher *v.* Prittie, 10 Bing. 408; Shrubsole *v.* Sussams, 16 C. B. N. S. 452; Smith *v.* Merrill, 9 Gray, 144; Kingman *v.* Tir-

§ 105. **Preference to promote Discharge or Composition.** — Another important application of this rule of equality is that money paid or security given to a creditor to induce him to assent to the bankrupt's discharge is a fraud on the other creditors which will avoid the discharge.[1] It was held at one time that such an advantage, though it should be given by a friend or enemy without the privity of the bankrupt, was a fraud on the law.[2] Lord Eldon thought that some of the decisions had gone too far in this direction. "I feel it very difficult," he said, "upon attention to any principle that has furnished this rule, to support the doctrine, that a bankrupt is not to have his certificate, if, though he would abhor such means of procuring it, some too active friend has advanced a sum of money, to obtain it; in a case perhaps, when he might have obtained it honestly by other means."[3] And the same eminent judge permitted a bankrupt to have a certificate so obtained cancelled, and to apply again.[4]

If it can be clearly shown that the bankrupt was not privy to the fraud, justice requires that he should not suffer for it.[5] But, in general, any payment or security given by any one must be presumed to be given on behalf of the bankrupt. And any assent so obtained, which may have misled others, would in itself operate as a fraud, and, even if the bankrupt were not privy to the arrangement, would probably vitiate the discharge.[6] Such a fraud vitiates the discharge whether

rell, 11 Allen, 97; Pierce *v.* Evans, 61 Penn. St. 415; Quinebaug Bank *v.* Brewster, 30 Conn. 559; Rice *v.* Grafton Mills, 117 Mass. 228; Leighton *v.* Morrill, 159 Mass. 271; Clark *v.* Northampton Bank, 160 Mass. 26; Mundo *v.* Shepard, 166 Mass. 323. [The burden is on the trustee attacking the preference. Re Laurie, 5 Manson, 48.] See also Whipple *v.* Bond, 164 Mass. 182; Akers *v.* Rowan, 33 So. Car. 451; Barbour *v.* Priest, 103 U. S. 293; Mundo *v.* Shepard, 166 Mass. 323.

[1] See notes *infra*, *passim*. See *infra*, § 476.

[2] Robson *v.* Calze, Doug. 228; Holland *v.* Palmer, 1 Bos. & P. 95; Ex parte Hall, 1 Rose, 2, 17 Ves. 63; Ex parte Butt, 10 Ves. 359; Smith *v.* Bromley, Doug. 696, note; Phillips *v.* Dicas, 15 East, 248.

[3] Ex parte Butt, 10 Ves. 359. See Ex parte Hall, 1 Rose, 2, 17 Ves. 63.

[4] Ex parte Harrison, 1 Christian, 2d ed., p. 343.

[5] See Ex parte Milner, 15 Q. B. D. 605; Ex parte Briggs, 2 Lowell, 389, Fed. Cas. No. 1868.

[6] Re Whitney, 2 Lowell, 455, Fed. Cas. No. 17,580; Bell *v.* Leggett, 7 N. Y. 176.

there is anything expressed in the statute upon the subject or not.[1]

It has sometimes been held that the mere payment to induce a withdrawal of opposition will not avoid a discharge unless there is evidence that the opposition was well founded.[2] But the better opinion is that a payment made by the debtor himself, or in his behalf with his privity, is conclusive evidence that there was some occasion to fear a successful opposition, and it therefore avoids the discharge.[3] Another reason sometimes given is that creditors are morally bound not to oppose a discharge without good cause, and that a promise of money to instigate them to do their duty is not only without consideration, but tainted with positive illegality.[4] And any agreement by which the assignee or a creditor undertakes to forego the bankrupt's examination is void, though the consideration is money paid to the assignee for all the creditors, and there is no evidence that any loss has been sustained by them from the lack of an examination.[5]

§ 106. **Preference in Compositions.** — In compositions, whether made in court by virtue of some statute, or by arrangement in the country, the rule is the same, provided: 1. The arrangement purports to be an equal one for the ben-

[1] Horn *v.* Ion, 4 B. & Ad. 78. Of course, if the terms of a particular statute are relied on, the case must come within it. Taylor *v.* Wilson, 5 Ex. 251, explained in Hall *v.* Dyson, 17 Q. B. 785, and compare Davis *v.* Holding, 11 A. & E. 710, with Davis *v.* Holding, 1 M. & W. 159; and see Belcher *v.* Sambourne, 6 Q. B. 414, and Ex parte Green, 1 Dea. & Ch. 230; Waite *v.* Harper, 2 Johns. 386; Bruce *v.* Mullikin, 4 Johns. 410; Yeomans *v.* Chatterton, 9 Johns. 295; Blasdel *v.* Fowle, 120 Mass. 447.

[2] Chamberlin *v.* Griggs, 3 Denio, 9; Fox *v.* Paine, 10 Ala. 523. See *infra*, § 478.

[3] Sumner *v.* Brady, 1 H. Bl. 647; Jackson *v.* Davison, 4 B. & Ald. 691; Bruce *v.* Lee, 4 Johns. 410; Wiggin *v.* Bush, 12 Johns. 306; Tuxbury *v.* Miller, 19 Johns. 311; Hall *v.* Dyson, 17 Q. B. 785; Coates *v.* Blush, 1 Cush. 564; Bell *v.* Leggett, 7 N. Y. 176; Marble *v.* Grant, 73 Maine, 423.

[4] See remarks of the judges in Smith *v.* Bromley, Doug. 696, note; Ex parte Joseph, 18 Ves. 340; Dexter *v.* Snow, 12 Cush. 594.

[5] Nerot *v.* Wallace, 3 T. R. 17; Murray *v.* Reeves, 8 B. C. 421; Gould *v.* Williams, 4 Dowl. P. C. 91; Hall *v.* Dyson, 17 Q. B. 785; Dexter *v.* Snow, 12 Cush. 594. See Staines *v.* Wainwright, 6 Bing. N. C. 174. But a payment of all the creditors in full relieves the debtor and purges the fraud, and an agreement on such consideration may be valid. Kaye *v.* Bolton, 6 T. R. 134.

efit of all creditors alike; and 2. The preference of the particular creditor is secret.

§ 107. **Creditors may prove if the Composition is set aside.** — When a composition deed is set aside in favor of the assignees in bankruptcy, the creditors who have signed it can prove their debts, since the trusts were not preferences. The trustees would not usually be allowed anything for their services,[1] though they might in some cases be reimbursed their actual expenses.[2] Such deeds are usually made upon the condition that all creditors shall assent; and if a trustee should have fully executed the trusts and distributed the assets, supposing that all had come in, it is doubtful whether the assignee could recover them of him.

§ 108. **Rights of Debtor under a Void Composition.** — Whether the debtor can avail himself of this superiority of position will depend on how far the contract has been executed. He cannot call upon any court to carry out the corrupt bargain; and though the creditor's release is held to bind him, the debtor cannot force him to surrender securities which he lawfully held before the date of the composition, though they were agreed to be surrendered, or to do any other act left unexecuted; and so it may happen that the preferred creditor will recover his whole debt if the release which he has given was not absolute.[3] It has been held that the creditor cannot set up that he was fraudulently induced to make the fraudulent release, because the whole transaction is single, and all tainted with the fraud. But this has been doubted.[4]

§ 109. **Voluntary Payments after Lapse of Time.** — Although a secret payment of money to induce a creditor to accept a composition may be recovered back, yet if the payment is voluntarily made, after a lapse of time, in fulfilment of the void-

[1] Bartlett *v.* Bramhall, 3 Gray, 257.

[2] Brown *v.* Coggeshall, 14 Gray, 134.

[3] Higgins *v.* Pitt, 4 Ex. 312; Smith *v.* Owens, 21 Cal. 11; Stuart *v.* Blum, 28 Penn. St. (4 Casey) 225; Downs *v.* Lewis, 11 Cush. 76.

[4] Mallalieu *v.* Hodgson, 16 Q. B. 689. See s. c. in equity, Ex parte Oliver, 4 De G. & Sm. 354; and see *contra*, Elfelt *v.* Snow, 2 Sawyer, 94, Fed. Cas. No. 4342; Armstrong *v.* Mech. N. Bank, 6 Biss. 520, Fed. Cas. No. 545.

able promise, it cannot be recovered back on the familiar principle applicable to voluntary payments.[1] It is partly for this reason, perhaps, that no case can be found in which the debtor has recovered back the amount of the composition itself.

A mere exchange of securities, or a promise to pay an entire sum, of which a part was voidable on this account will not purge the illegality.[2] If the creditor has negotiated a note tainted with this fraud, and the indorsee has forced the debtor to pay it, he may recover the amount of the creditor.[3] And though a third person cannot recover money which he has paid for the debtor's release,[4] it has been intimated that if the debtor has been forced to pay the composition notes by a *bona fide* holder, he may, perhaps, recover of the creditor the amount which the third person has paid.[5]

A written promise made two years after the statutory composition, and after a second discharge in bankruptcy, has been held bad, if made in pursuance of a fraudulent oral agreement.[6]

§ 110. **Composition failing, the Original Debt may be recovered.** — If the composition falls through, and bankruptcy occurs, the assignees, as we have seen, can recover any securities secretly given to the preferred creditor.[7] But the debtor himself remains liable for the original debt,[8] and therefore he cannot recover property which he may have conveyed as security. And where the composition had become void by failure to pay the last instalment, a creditor who had secretly received an

[1] Wilson *v.* Ray, 10 A. & E. 82; Ward *v.* Bird, 5 C. & P. 229, explained in Bradshaw *v.* Bradshaw, 9 M. & W. 29; Viner *v.* Hawkins, 9 Ex. 266; but see Re Lenzberg's Policy, 7 Ch. D. 650. [See Wilson *v.* Boylston Bank, 170 Mass. 9, for a case where the debtor sued a creditor for money paid him by the assignee to induce him to assent to a composition.]

[2] Clay *v.* Ray, 17 C. B. N. S. 188; Geere *v.* Mare, 2 H. & C. 339; Mare *v.* Sandford, 1 Giff. 288; Mare *v.* Warner, 3 Giff. 100; Mare *v.* Earle, ib. 108.

[3] Smith *v.* Cuff, 6 M. & S. 160; Horton *v.* Riley, 11 M. & W. 492.

[4] Solinger *v.* Earle, 82 N. Y. 393.

[5] Bradshaw *v.* Bradshaw, 9 M. & W. 29.

[6] Tirrell *v.* Freeman, 139 Mass. 297; *contra*, Trumball *v.* Tilton, 21 N. H. 128.

[7] *Supra*, § 109.

[8] Davis *v.* Holding, 11 A. & E. 710; Walker *v.* Mayo, 143 Mass. 42; Brookmire *v.* Bean, 3 Dillon, 136, Fed. Cas. No. 1942, but doubted by the learned judge in a note to that case.

amount equal to the whole composition was not permitted to prove in bankruptcy in competition with the other creditors.[1]

§ 111. **Secured Creditors.** — It is always the practice in deeds of composition to reserve all rights of the creditors to securities which they hold upon the debtor's property, and to give them their share of the composition only on the amount of debt above the value of the security, as in bankruptcy. If this precaution is omitted, and an absolute release is given, the creditor must relinquish his security.[2] It has been held that the reservation should be known to all creditors, or at least within their means of knowledge. These last decisions are of doubtful soundness, for no creditor should be presumed to give up a valid and legal advantage; and accordingly the courts are unwilling to construe the deed in such a way as to destroy the security if it can be avoided.[3] A secret stipulation by the debtor that the security shall realize a certain sum is, of course, void.[4]

Attachments on mesne process in New England are usually relinquished, for the reason that they are dissolved by bankruptcy, and therefore when the creditors prefer a composition, they must be content to take what they would receive in bankruptcy.[5]

§ 112. **Sureties and Guarantors.** — Indorsements, guarantees, and undertakings of third persons for the debt of another are sometimes called securities, as indeed are bills and notes of the debtor himself. "Securities" is not used in this sense in the preceding section. Sureties, etc., are discharged by the discharge of the principal debtor for wholly different reasons from those just now considered. But the creditors, in signing a composition, may expressly reserve all rights against

[1] Ex parte Oliver, 4 De G. & Sm. 354.

[2] Stock *v.* Mawson, 1 Bos. & P. 286, 6 Ves. 300; Cullingworth *v.* Loyd, 2 Beav. 385; Coleman *v.* Waller, 3 Y. & J. 212; Alsager *v.* Spalding, 4 Bing. N. C. 407; Cowper *v.* Green, 7 M. & W. 633.

[3] Duffy *v.* Orr, 1 Cl. & F. 253; Thomas *v.* Courtnay, 1 B. & A. 1; Lee *v.* Lockart, 3 Myl. & Cr. 302; Davidson *v.* McGregor, 8 M. & W. 755; Smith *v.* Salzmann, 9 Ex. 535; Squire *v.* Ford, 9 Hare, 47; Rich *v.* Lord, 18 Pick. 322.

[4] McKewan *v.* Sanderson, L. R. 20 Eq. 65.

[5] See Mass. St. 1889, c. 406.

third persons; and such is the usual and reasonable practice.[1] Even as to them it has been held that the reservation should be open and notorious, because, as they may resort to the debtor for indemnity, the unsecured creditors have the right to calculate on this liability in determining whether to adopt the compromise.[2]

§ 113. **Understatement by a Creditor of his Debt.** — When the understatement of a debt may possibly be injurious to the creditors generally, or to a surety, the creditor who has knowingly made such a statement cannot afterwards recover the difference from the debtor, though the statement was made at his request; for instance, when the surety is depending on the future earnings or acquisitions of the compounding debtor for his indemnity, or when the composition is payable by instalments which have not all matured.[3]

So, under the insolvent laws, creditors named in the schedule were barred of their ordinary remedies to the extent of the debts so scheduled, but the assignees could apply future property of the debtor, in a certain way and under certain circumstances, to the proportionate payment of those debts. It was held that a creditor whose debt was omitted in whole or in part, with his consent, could not recover judgment against the debtor for the remainder, because he might thereby intercept the property of the debtor from coming to the assignees.[4]

If, however, all the old debts are fully paid or satisfied, there are decisions that a debt omitted by agreement may be recovered, in the absence of any positive stipulation that all creditors were to execute the composition deed.[5] And in this

[1] Kearsley *v.* Cole, 16 M. & W. 128; Bateson *v.* Gosling, L. R. 7 C. P. 9, explaining Webb *v.* Hewitt, 3 Kay & J. 438; Green *v.* Wynn, L. R. 7 Eq. 28; affirmed, L. R. 4 Ch. 204; Sohier *v.* Loring, 6 Cush. 537; Tobey *v.* Ellis, 114 Mass. 120.

[2] Davidson *v.* McGregor, 8 M. & W. 755; Thomas *v.* Courtnay, 1 B. & A. 1; Alsager *v.* Spalding, 4 Bing. N. C. 407; Ex parte Sadler, 15 Ves. 52.

[3] Holmer *v.* Viner, 1 Esp. 131; Britten *v.* Hughes, 5 Bing. 460; Russell *v.* Rogers, 10 Wend. 473; Teede *v.* Johnson, 11 Ex. 840; Blackstone *v.* Wilson, 26 L. J. Ex. 229.

[4] See Eastabrook *v.* Scott, 3 Ves. 456; Russell *v.* Rogers, 10 Wend. 473.

[5] Eastabrook *v.* Scott, 3 Ves. 456; Russell *v.* Rogers, 15 Wend. 351; Huntington *v.* Clark, 39 Conn. 540.

country, where future property never passes to the assignees, it is not a fraud to omit the name of a creditor from the schedule, with his consent, since that act cannot prejudice any one but the creditor himself.[1]

§ 114. **Sureties and Creditors assuming a Greater Burden than others.** — If one creditor assumes greater burdens than the others, such as by being surety for the payment of the composition, or by postponing his debt until all others are satisfied, there is no fraud on the face of the transaction though he should agree for a larger eventual dividend than the others receive.[2] It has been held that concealment would vitiate such a contract;[3] but this appears more than doubtful. The creditors may be presumed to know that a surety will demand security.[4]

§ 115. **No Agreement for Equality.** — If there is no common action by the creditors, and no representation, express or implied, that they are to share alike, the debtor may lawfully settle with each as best he can, because in such a case one creditor owes no duty to another.[5] For similar reasons it is not illegal for a friend of the debtor, not indemnified by him, to procure a creditor to proceed, or to abstain from proceeding, in bankruptcy against a debtor not already bankrupt, or to buy up debts at different rates in order to prevent or dismiss the proceedings.[6] It is unlawful to buy debts with a view to influencing the choice of assignees, or for the purpose of bringing proceedings oppressively for a collateral object.[7]

[1] Re Needham, 1 Lowell, 309, Fed. Cas. No. 10,081.

[2] Eastabrook *v.* Scott, 3 Ves. 456; Wells *v.* Hacon, 5 B. & S. 196; Bissell *v.* Jones, L. R. 4 Q. B. 49; Ex parte Nicholson, L. R. 5 Ch. 332; Dewhirst *v.* Jones, 3 H. & C. 60; Ex parte Burrell, 1 Ch. D. 537; Re Shaw, 9 Fed. Rep. 495.

[3] Leake *v.* Young, 5 E. & B. 955; Wood *v.* Barker, L. R. 1 Eq. 139.

[4] See cases *supra*, note 2.

[5] Clarke *v.* White, 12 Pet. 178; affirming 5 Cranch C. C. 102, Fed. Cas. No. 17,540; Williams *v.* Carrington, 1 Hilt. 515; Kellogg *v.* Richards, 14 Wend. 116; Babcock *v.* Dill, 43 Barb. 577; Smith *v.* Stone, 4 Gill & J. 310; Goldenbergh *v.* Hoffman, 69 N. Y. 322; Smith *v.* Salzmann, 9 Ex. 535; Levita's Claim (1894), 3 Ch. 365.

[6] Fry *v.* Malcolm, 5 Taunt. 117; Ecker *v.* Bohn, 45 Md. 278; Ecker *v.* McAllister, 17 N. B. R. 42.

[7] Ex parte Griffin, 12 Ch. D. 480; Re Pooley, 20 Ch. D. 685.

§ 116. **Secrecy essential.** — Secrecy is of the essence of this fraud in compositions, because the creditors may agree to such division of assets as they choose. If the contract is known to them before they assent to the composition, they cannot afterwards complain.[1]

An actual concealment may not be necessary if the bargain is one which would not be reasonable and to be expected. But, speaking generally, the burden of proving a fraud is on him who alleges it.[2]

§ 117. **Composition void, though no Injury to Creditors.** — Where a statute or implied undertaking forbids the preference, it will be void, although no creditor has been misled by it; as, for example, if the composition (supposed to be equal) or consent to the bankrupt's discharge is signed by the preferred creditor after all others have signed, and though his assent should not be necessary to the discharge.[3]

§ 118. **Note given to promote a Void Composition.** — A note or bill given to the preferred creditor will be valid in the hands of a *bona fide* holder for value, unless there is some statute making the security absolutely void *ab initio*.[4] That a statute may be so drawn is clear; but the courts will not readily admit such to be the meaning.[5]

[1] Phettiplace *v.* Sayles, 4 Mason, 312, Fed. Cas. No. 11,083; Lee *v.* Lockhart, 3 Myl. & Cr. 302, citing on this point Ex parte Sadler & Jackson, 15 Ves. 52, where Lord Eldon offered an inquiry whether the additional security was known to the creditors. Ex parte Russell, 2 Ch. D. 424; Re Walshe, 2 Woods, 225, Fed. Cas. No. 17,118.

[2] 1 Bigelow, Fraud, p. 123; Bump, Fraudulent Conveyances, 4th ed., § 177; Burrill, Assignments, 6th ed., § 310.

[3] Steinman *v.* Magnus, 11 Eas 0; Payne *v.* Eden, 3 Caines, 213; Patterson *v.* Boehm, 4 Penn. St. 507; Re Palmer, 2 Hughes, 177, Fed. Cas. No. 10,678; Pinneo *v.* Higgins, 12 Abb. Pr. 334; Ex parte Milner, 15 Q. B. D. 605.

[4] See Birch *v.* Jervis, 3 C. & P. 379.

[5] See Reeves *v.* Hawkes, 6 L. T. N. S. 53; Goldsmid *v.* Hampton, 5 C. B. N. S. 94; Taylor *v.* Wilson, 5 Exch. 251; Dalrymple *v.* Hillenbrand, 17 N. B. R. 434.

CHAPTER VI.

BANKRUPTCY OF PARTNERS.

§ 119. **Settlement of Estates of Partners.** — If partners are made bankrupt by a joint adjudication, which is the usual case, their assignees have the right, of course, to deal with all the firm assets, and with all those of the several partners.[1] If the partners are made bankrupt separately, within the same jurisdiction, the court may order the several cases to be consolidated, or, under the old practice, one to be impounded.[2] By rule, under our late bankrupt law, if partners were made bankrupt in different districts, the first petition was to be proceeded with and the other to be stayed.[3]

Much of the doctrine of this chapter might be given under the head of proof of debts, but as it is really a question of marshalling assets, though spoken of as proof against the joint or the separate assets, it has been found convenient to consider it separately. When proof of debts is spoken of in this chapter this point should be remembered.

§ 120. **Joint and Separate Assets.** — The most important rule in the settlement of partnership affairs in bankruptcy is, that the creditors of the firm have the first claim on the joint assets, and the separate creditors of each partner upon his separate assets. This rule was early adopted in England,[4] and

[1] Ex parte Philps, L. R. 19 Eq. 256; Lindsey *v.* Corkery, 29 Grat. 650; Re Leland, 5 N. B. R. 222, Fed. Cas. No. 8228; Wright *v.* Cohn, 88 Cal. 328.

[2] See Ex parte Rowlatt, 2 Rose, 416; Ex parte Rawson, 1 V. & B. 160; Ex parte Lister, Mont. & Ch. 260; Re Gowar, 1 M. D. & De G. 1; Ex parte Bateson, 1 M. D. & De G. 500; Ex parte Green, 3 De G. & J. 50; Ex parte Burdikin, 1 M. D. & De G. 156; Ex parte Mackenzie, L. R. 20 Eq. 758; Re Abbott, 10 Morrell, 306.

[3] Rule 16, see *infra*, § 495. See as to simultaneous proceedings in England and Ireland, Re O'Reardon, L. R. 9 Ch. 74.

[4] Ex parte Crowder, 2 Vernon, 706; Ex parte Cook, 2 P. Wms. 500; Act of 1898, § 5 f. See *infra*, § 468.

though departed from by Lord Thurlow,[1] was restored by his successor,[2] and has prevailed ever since, and is now prescribed by statute.[3] It is said to be founded on the theory that the firm creditors give credit to the firm, and the separate creditors to the individuals. The priority of the separate creditors on the separate estates is objected to on the ground that the creditors of the firm have a just claim against each partner, and that by this rule they are deprived of a part of their security; but this objection has not prevailed. It is understood that the same rule obtains on the continent of Europe, where a partnership is treated as a distinct legal person, almost like a corporation. Although it does not obtain in Scotland, where the creditors of the firm rank first upon the joint estate, and prove against the separate estates for any deficiency, Mr. Bell, admitting that that accords with theory, considers the English rule more reasonable.[4]

In the United States there has been some difference of opinion on this point when it has been left to the courts without a positive provision of the statutes. But the bankrupt and insolvent laws have usually adopted this rule by positive enactment, and a large and increasing majority of the courts have established it when not so adopted.[5]

The assets have been divided indiscriminately between both

[1] Ex parte Cobham, 1 Bro. C. C. 576; Ex parte Hodgson, 2 Bro. C. C. 5; Ex parte Page, 2 Bro. C. C. 119.

[2] Ex parte Elton, 3 Ves. 239; Ex parte Abell, 4 Ves. 837; Ex parte Clay, 6 Ves. 813; Ex parte Taitt, 16 Ves. 193.

[3] Bankrupt Act, 1883, § 40, subsec. 3.

[4] 2 Bell Com., 7th ed., 550 [*660]. Mr. Bates, § 827, finds this to be the rule in Kentucky.

[5] See *acc.* McCulloh v. Dashiell, 1 Harris & Gill, 96, and 18 Am. Dec. 271 and cases; Murrill v. Neill, 8 How. 414; Burnside v. Merrick, 4 Met. 537; Rogers v. Meranda, 7 Ohio St. 179; Davis v. Howell, 33 N. J. Eq. 72; Black's Appeal, 44 Penn. St. 503; McCormick's Appeal, 55 Penn. St. 252; Woodrop v. Ward, 3 Desaus. 203; Tunno v. Trezevant, 2 Desaus. 264; Hall v. Hall, 2 McCord Ch. 269; Ladd v. Griswold, 4 Gilm. 25; Morrison v. Kurtz, 15 Ill. 193; Wilder v. Keeler, 3 Paige, 167; Meech v. Allen, 17 N. Y. 300; Re Gray, 111 N. Y. 404; Crooker v. Crooker, 46 Maine, 250, 52 Maine, 267; Jarvis v. Brooks, 23 N. H. 136; Crockett v. Crain, 33 N. H. 542; Holton v. Holton, 40 N. H. 77; Cadwell's Ass't, 89 Ia. 533; Hill v. Cornwall, 95 Ky. 512. See *infra*, § 468. *Contra*, Bardwell v. Perry, 19 Vt. 292; Camp v. Grant, 21 Conn. 41. See cases collected, 2 Bates on Partnership, § 825.

classes of creditors, when every creditor has assented, or when the accounts have been so kept that it would be impossible or very difficult and expensive to discriminate between the joint and separate debts and assets.[1]

§ 121. **What is Property of the Firm.** — As to what property will be considered to belong to the firm, or to the several partners, the reader is referred to works on Partnership.

In bankruptcy the courts treat this question according to the fact, so that if a creditor takes security upon property of the firm, having reason to suppose it belonged to one partner, it will be held a firm security notwithstanding the ignorance of the creditor that it was so;[2] nor does it make any difference that one partner owns the whole capital, his separate creditors must give way to those of the firm.[3] In England, however, if one is held out as a partner to the world generally, the stock in trade will be firm assets in bankruptcy.[4] This seems to depend on the doctrine of reputed ownership, which does not obtain in this country.[5]

In the absence of fraud, the rule will not be varied by evidence that money borrowed on the credit of one partner has, in fact, been applied for the benefit of the firm, or *vice versa*.[6] The right of participation in joint or separate assets will be

[1] Ex parte Fuller, 1 Mont. & A. 222; Harris *v.* Farwell, 13 Beav. 403; Ex parte Part, 2 Dea. & Ch. 1; Ex parte Sheppard, 3 Dea. & Ch. 190; Lindley, Partnership, 6th ed., p. 712; Re Kriegel, 10 Morrell, 99. [In the United States a creditor who holds a joint and several obligation may prove against the firm and the separate estate also. Re Farnum, 6 Law Rep. 21, Fed. Cas. No. 4674; Mead *v.* Nat. Bank, 6 Blatch. 180, Fed. Cas. No. 9366; Re Bradley, 2 Biss. 515, Fed. Cas. No. 1772; Re Tesson, 9 N. B. R. 378, Fed. Cas. No. 13,844; Ex parte Nason, 70 Maine, 363; Roger Williams Bank *v.* Hall, 160 Mass. 171; Carter's Ass't, 98 Ia. 261. This rule did not obtain in England until established by statute. Ex parte Bevan, 10 Ves. 107; Ex parte Rowlandson, 3 P. Wms. 405; Ex parte Hill, 2 Dea. 249; Goldsmid *v.* Cazenove, 7 H. of L. Cases, 785; Ex parte Chevalier, 1 Mont. & A. 345. See 32 & 33 Vict., c. 71, § 37, and Simpson *v.* Henning, L. R. 10 Q. B. 406; Banco De Portugal *v.* Waddell, 42 L. T. 698, 5 App. Cas. 161.]

[2] Ex parte Connell, 3 Dea. 201; Re Collie, 3 Ch. D. 481.

[3] Ex parte Hunter, 2 Rose, 382.

[4] Re Rowland, L. R. 1 Ch. 421; Re Hayman, 8 Ch. D. 11; Ex parte Arbouin, De G. 359.

[5] See *infra*, § 362.

[6] Ex parte Bolitho, Buck, 100; Ex parte Peele, 6 Ves. 602; Ex parte Hartop, 12 Ves. 349; Ex parte Hunter, 1 Atk. 223; Ex parte Emly, 1 Rose, 61.

decided in the same way as when an action at law is brought against a solvent person or his firm.

If a creditor takes a firm obligation for the debt of one partner, he is bound to show the authority of the partner to give it, and may then prove against the joint assets, unless it was given as security, in which case he may prove against both estates, — provided always that the new obligation was given in good faith, and not for the purpose of obtaining a larger dividend in an apprehended bankruptcy.[1]

§ 122. **Joint Creditor taking Separate Promise.** — If one who has the right to a joint credit has knowingly accepted a separate promise in payment, or if he has taken judgment against, or a bond executed by, a part only of the members of the firm, the joint debt is merged in the new and higher obligation,[2] unless that is expressly taken as security only; and in case of bills and notes the presumption usually is that they are taken as security.[3] The rule of merger by judgment, however, does not obtain if the omitted partner, though alive, was beyond the reach of process, or died before action brought.[4]

And it will be understood that if the original debt is joint and several, a separate judgment is no merger.[5] So one who accepts a joint for a separate obligation.[6] In several of the States it is provided by statute that a judgment against some of the partners shall not be a merger.[6] The law in bankruptcy will be modified accordingly in cases to which these statutes apply.

§ 123. **Election.** — If the promise is ambiguous, as if a note or contract, whether under seal or not, be signed by the part-

[1] Ex parte Thorpe, 3 Mont. & A. 716; Ex parte Austen, 1 M. D. & De G. 247; Ex parte Agace, 2 Cox, 312; Ex parte Bonbonus, 8 Ves. 540; Ex parte Goulding, 2 Gl. & J. 118.

[2] Ex parte Flintoff, 3 M. D. & De G. 726; Ex parte Higgins, 3 De G. & J. 33; Tremlett v. Hooper, 10 Gray, 254; Re Savage, 16 N. B. R. 368, Fed. Cas. No. 12,381; Re Herrick, 13 N. B. R. 312, Fed. Cas. No. 6420.

[3] Ex parte Seddon, 2 Cox, 49; Ex parte Lobb, 7 Ves. 592; Ex parte Hay, 15 Ves. 4; Ex parte Kedie, 2 Dea. & Ch. 321; Keay v. Fenwick, 1 C. P. D. 745; Bottomley v. Nuttall, 5 C. B. N. S. 122.

[4] Dennett v. Chick, 2 Greenl. 191; Rand v. Nutter, 56 Maine, 339; Bean v. Birdsall, 29 Barb. 549; Ex parte Waterfall, 4 De G. & S. 199.

[5] Drake v. Mitchell, 3 East, 251; Ex parte Bate, 3 Dea. 358.

[6] See Bates on Partnership, § 537.

ners, but not in the firm name, or if a latent ambiguity is proved by the fact that the partners were in the habit of using the given form in their partnership dealings, the true nature of the transaction may be shown.[1]

So if the fact of partnership, or of there being a dormant partner, is not known to the creditor, and the debt is in fact joint, he may elect to prove against the separate estate or estates, according to the form of the obligation, or against the joint estate as an undisclosed principal.[2] But if one knowing of the partnership discounts the paper of one member, or lends him money, he cannot prove against joint assets, though the money was borrowed for their use.[3] If the original obligation is joint and several, a separate judgment is, of course, no merger, but a joint judgment will be.[4]

§ 124. **Election at the Time of Proof.** — Although the rule now under consideration pertains rather to the distribution of the assets than the proof of debts,[5] it is highly convenient to decide at the time the proof is offered what its effect shall be, and accordingly the practice is for the creditor to signify in his proof against which estate or estates he claims the right of proof; and the decision is probably subject to appeal, as in case of other proofs.[6] This point is important only when the mode of applying to the higher court is different, when the question is one of proof from what it is upon points of marshalling.

[1] Agawam Bank *v.* Morris, 4 Cush. 99; Ex parte Stone, L. R. 8 Ch. 914; Ex parte Nason, 70 Maine, 363; Re Thomas, 17 N. B. R. 54, Fed. Cas. No. 13,886; Berkshire Woolen Co. *v.* Juillard, Receiver, 75 N. Y. 535. See Ex parte Weston, 12 Met. 1.

[2] Ex parte Adam, 2 Rose, 36; Ex parte La Forest, Cooke, 7th ed., 261; Ex parte Benson, Cooke, 7th ed., 263; Ex parte Law, 3 Dea. 541; Re Warren, 2 Ware, 322, Fed. Cas. No. 17,191; Ex parte First Nat. Bank, 70 Maine, 369; Ex parte Norfolk, 19 Ves. 455, where Lord Eldon says the rule had been established for thirty years; Ex parte Hamper, 17 Ves. 403; Ex parte Chuck, 8 Bing. 469.

[3] Emly *v.* Lye, 15 East, 7, case referred by the Lord Chancellor; Ex parte Emly, 1 Rose, 61; Ex parte Wheatley, Cooke, 7th ed., 509.

[4] Re Herrick, 13 N. B. R. 312, Fed. Cas. No. 6420; Dennett *v.* Chick, 2 Greenl. 191, 11 Am. Dec. 59; Freeman, Judgments, 4th ed., § 235.

[5] Purple *v.* Cooke, 4 Gray, 120; Harmon *v.* Clark, 13 Gray, 114.

[6] Conant *v.* Perkins, 107 Mass. 79.

§ 125. **A Joint Creditor may prove against Separate Estates when there are no Joint Assets and no Solvent Partner.** — In England an exception to the general rule was introduced by Lord Rosslyn, and has been adhered to, by which the joint creditors may prove against the separate estates in competition with separate creditors, if there is no joint property and no solvent partner.[1] This exception is carried to such a refinement that if the joint assets are insignificant, not enough even to pay the costs, or, as it has been held, if the separate creditors create a small joint fund by buying worthless separate assets, the general rule holds.[2]

A solvent partner means one within the jurisdiction;[3] but if such partner is technically solvent, that is, has made no general assignment, or is subject to no adjudication, he is to be considered solvent.[4]

The reason for the rule concerning a solvent partner is that if he pays the debts, his proof will be limited to the actual balance due him, whereas creditors prove for the full amount of their debts.

In Massachusetts the rule of marshalling, in administering the estates of living insolvents, is provided by the statute itself, and the courts hold that this positive direction is not affected by the fact of the absence of joint assets, and has no exception.[5]

Most courts in this country adhere to the English exception, on the ground that the doctrine which had been originally established by the English courts should, when adopted here by statute, be taken with its exceptions;[6] and some decisions go

[1] Ex parte Janson, Buck, 227, 3 Madd. 229; Ex parte Morris, Mont. 218; Cowell v. Sikes, 2 Russ. 191; Ex parte Sadler, 15 Ves. 52; Re Budgett (1894), 2 Ch. 557.

[2] Ex parte Kennedy, 2 De G. M. & G. 228; Re Marwick, 2 Ware, 233, Fed. Cas. No. 9181; Ex parte Bradshaw, 1 Gl. & J. 99.

[3] Ex parte Kensington, 14 Ves. 447; Ex parte Morris, Mont. 218.

[4] Ex parte Janson, Buck, 227, 3 Madd. 229.

[5] Howe v. Lawrence, 9 Cush. 553; Robb v. Mudge, 14 Gray, 534; Wild v. Dean, 3 Allen, 579; Somerset Potters Works v. Minot, 10 Cush. 592.

[6] Re Downing, 1 Dillon, 33, Fed. Cas. No. 4044; Emanuel v. Bird, 19 Ala. 596; Re Knight, 8 N. B. R. 436, Fed. Cas. No. 7880; Rogers v. Meranda, 7 Ohio St. 179; Brock v. Bateman, 25

beyond the precedents, holding that there must be joint assets after paying costs.[1]

Other very respectable authorities agree with those of Massachusetts.[2] One learned judge, giving his opinion in the Supreme Court, called this and another English exception "eccentric variations" from the general rule.[3]

§ 126. **Joint Contractors.** — In England it is held that all joint debts of partners, though without relation to the business, as where they are jointly and severally sureties for a third person, may be proved against the joint assets, and that the general rule of marshalling applies to all joint contractors, though they should not be partners.[4]

But in the United States, wherever it is matter of statute, the rule is, in terms, confined to partners, and, by decision, to promises or undertakings which bind the firm. If joint contractors or obligors, not partners, are bankrupt, they must be so separately, and the creditor's claim is severed, and he can prove against each estate, or he cannot prove at all in competition with the bankrupt's other creditors. The former alternative is adopted.[5]

§ 127. **Bankruptcy of One Partner.** — If one partner is adjudicated bankrupt, and his estate is assigned, the firm is thereby

Ohio St. 609; Re Collier, 12 N. B. R. 266, Fed. Cas. No. 3002; Re Pease, 13 N. B. R. 168, Fed. Cas. No. 10,881; Re Litchfield, 5 Fed. Rep. 47; Harris *v.* Peabody, 73 Maine, 262; Re Jewett, 1 N. B. R. 491, Fed. Cas. No. 7304; Re Rice, 9 N. B. R. 373, Fed. Cas. No. 11,750; Re Goedde, 6 N. B. R. 295, Fed. Cas. No. 5500.

[1] Re McEwen, 12 N. B. R. 11, Fed. Cas. No. 8783; Re Smith, 13 N. B. R. 500, Fed. Cas. No. 12,987; Harris *v.* Peabody, 73 Maine, 262; Re Blumer, 12 Fed. Rep. 489.

[2] *Quære* by Ware, J., in Re Marwick, 2 Ware, 233, Fed. Cas. No. 9181; Weyer *v.* Thornburgh, 15 Ind. 124; Eaton *v.* Able, 91 Ind. 107; Warren *v.* Farmer, 100 Ind. 593; Re Walker, 6 Ont. App. 169; Re Estes, 3 Fed. Rep. 134; Re Byrne, 1 N. B. R. 464, Fed. Cas. No. 2270; Weaver *v.* Weaver, 46 N. H. 188, 192, per *Doe, J.*; Oakey *v.* Rabb, Freeman Ch. 546.

[3] Murrill *v.* Neill, 8 How. 414.

[4] Hoare *v.* Oriental Bank, 2 App. Cas. 589; Ex parte Field, 3 M. D. & De G. 95, overruling Ex parte Buckingham, 1 M. D. & De G. 235, and Ex parte Crosfield, 1 Dea. 405; and see Ex parte Bauerman, 3 Dea. 476, 480, per *Sir G. Rose.*

[5] See Ex parte Weston, 12 Met. 1; Harmon *v.* Clark, 13 Gray, 114, 122; Forsyth *v.* Woods, 11 Wall. 484, 486, per *Strong, J.*; Re Nims, 16 Blatch. 439, Fed. Cas. No. 10,269; Re Roddin, 6 Biss. 377, Fed. Cas. No. 11,989; Buffum *v.* Seaver, 16 N. H. 160; Mack *v.* Woodruff, 87 Ill. 570.

dissolved, and his trustees are tenants in common with the remaining partners.[1] If the trustees happen to have firm assets, they must keep separate accounts of the joint and separate estates, and make distribution accordingly.[2] The court has power to require them to assume the settlement of the partnership concerns.[3] But if the remaining partners are within the jurisdiction, and are in fact solvent, or are able to give bonds, the winding up of the company's affairs is usually, if they desire it, intrusted to them.[4] The dissolution of the partnership by the bankruptcy, as by the death of one partner, extends to all; the remaining members are no longer partners with each other.[5] The actual interest of the trustees is, of course, the bankrupt's share of the surplus, and they may sell their interest to the other partners, or require an accounting.[6] If, without a settlement, the remaining partners continue the business as if they were still partners, the trustees, like executors, may elect to take interest or profits.[7]

The law on this point is thus stated by Mr. Justice Lindley:[8] "The trustee [of one partner], it will be observed, does not become a co-partner with the solvent partners. Like purchasers from the sheriff under an execution against one partner, the trustee and the solvent partners become tenants in

[1] Holderness *v.* Shackels, 8 B. & C. 612; Murray *v.* Murray, 5 Johns. Ch. 60; Morgan *v.* Marquis, 9 Exch. 145; Barker *v.* Goodair, 11 Ves. 78; Fox *v.* Hanbury, Cowp. 445; Smith *v.* Stokes, 1 East, 363, per *Ld. Kenyon;* Freeland *v.* Stansfield, 2 Sm. & G. 479.

[2] Re Wait, 1 Jac. & W. 605; West *v.* Skip, 1 Ves. Sen. 239; Dutton *v.* Morrison, 17 Ves. 193; Murray *v.* Johnson, 5 Johns. Ch. 60; Barclay *v.* Phelps, 4 Met. 397; Re Shanahan, 6 Biss. 39, Fed. Cas. No. 12,701; Ex parte Rutherford, 1 Rose, 201; Act of 1898, § 5 d.

[3] Parker *v.* Muggridge, 2 Story, 334, Fed. Cas. No. 10,748; Ayer *v.* Brastow, 5 Law Reporter, 498, Fed. Cas. No. 682. See *infra*, § 468.

[4] Ex parte Owen, 13 Q. B. D. 113; Frazer *v.* Kershaw, 2 Kay & J. 496; Vetterlein *v.* Barnes, 6 Fed. Rep. 693; Allen *v.* Kilbre, 4 Madd. 464; Ex parte Finch, 1 Dea. & Ch. 274; Act of 1898, § 5 h, *infra*, § 468. [This rule does not apply when the solvent partner is an infant. Re Beauchamp, 3 Manson, 207.]

[5] Hague *v.* Rolleston, 4 Burr. 2174; Fox *v.* Hanbury, Cowp. 445; Ex parte Smith, 5 Ves. 295; Crawshay *v.* Collins, 15 Ves. 218.

[6] Ex parte Motion, L. R. 9 Ch. 192.

[7] Ex parte Finch, 1 Dea. & Ch. 274; Ex parte Trueman, ib. 464.

[8] Lindley, Partnership, 5th ed., p. 648. See Lindley, Partnership, 6th ed., p. 666.

common of the real and personal property belonging to the firm." He adds that the messenger is, in strictness, entitled to put a person in possession of the whole property of the firm. "This, however, is seldom done, as the solvent partners, either by consent or through the intervention of the court, make arrangements for securing to the trustee payment of the bankrupt's share in the assets of the firm." In this country the messenger would not have even the technical right to the custody of the joint assets; but in other respects our practice agrees with this statement.

As the parties are tenants in common, they must join as plaintiffs in actions to recover joint property.[1] If the trustee refuses to join, the solvent partners may use his name, if they first give him an indemnity against costs;[1] and the converse may be true, though the point is not likely to arise.

If there are no joint debts, and the trustees of one partner acquire all the partnership assets, a suit lies against them by the solvent partners for their part of the assets.[2]

§ 128. **Bankruptcy of One Partner, continued.** — The distribution between creditors of the firm and those of a bankrupt partner or partners are the same when one or more less than all are bankrupt. The joint creditors may prove their debts, but cannot receive dividends out of separate property in competition with the separate creditors.[3] In England the petitioning creditor may elect to prove against either estate; but this exception does not prevail in this country. Thus Lindley: "And where, under a separate adjudication, the trustee possesses himself of the assets of the firm, he must keep similar distinct accounts, so as not to pay the separate creditors of the

[1] Eckhardt *v.* Wilson, 8 T. R. 140; Thomason *v.* Frere, 10 East, 418; Halsey *v.* Norton, 45 Miss. 703. So as to part-owners of ship. Stinson *v.* Fernald, 77 Maine, 576.

[2] Hobbs *v.* McLean, 117 U. S. 567.

[3] Murray *v.* Murray, 5 Johns. Ch. 60; Ex parte Elton, 3 Ves. 238; Freeland *v.* Stansfield, 2 Sm. & G. 479; Ex parte Taitt, 16 Ves. 193; Re Brick, 4 Fed. Rep. 804; Re O'Reardon, L. R. 9 Ch. 74. See cases cited *supra;* Ex parte Rutherford, 1 Rose, 201; Barclay *v.* Phelps, 4 Met. 397; Burnside *v.* Merrick, 4 Met. 537; Agawam Bank *v.* Morris, 4 Cush. 99; Re Stevens, 1 Sawyer, 397, Fed. Cas. No. 13,393; Wilkins *v.* Davis, 2 Lowell, 511, Fed. Cas. No. 17,664; Clarke *v.* Stanwood, 166 Mass. 379.

bankrupt out of the assets of the firm, nor the creditors of the firm out of the separate property of the bankrupt."[1] The right of proof in such cases is involved in the decisions that a discharge in bankruptcy relieves the debtor from his partnership debts.[2]

This principle was overlooked in one or two cases under the late bankrupt law, from the circumstance that the statute mentioned only the bankruptcy of all the partners. But it is equally true in England and Massachusetts that, until recently, the case of a separate adjudication was not mentioned in the rule (having the force of law) which regulated this distribution. At this point the argument may well be applied that we take the law with its judicial construction, and it would be idle to suppose that the rule can be evaded by an accident of this sort.[3]

§ 129. **Death of Partner.** — Upon the death of a partner, the survivor not only has a right to wind up the affairs, but is at law the owner of the firm's property; and if he becomes bankrupt, his assignees may recover the joint assets from the representatives of the deceased partner.[4]

The rule of marshalling is the same as if the partners were living.[5] And in administering the insolvent estates of deceased persons, in England and most of the States, the joint assets go

[1] 2 Lindley, 4th ed., 1165, citing Dutton *v.* Morrison, 17 Ves. 193; Re Wait, 1 J. & W. 605; and see Ex parte Good, 5 Ch. D. 46. The order to keep separate accounts of joint and separate property when one partner is bankrupt is "the usual order." Ex parte Farlow, 1 Rose, 421; Ex parte Hall, 9 Ves. 349.

[2] Heath *v.* Hall, 4 Taunt. 326; Ex parte Crisp, 1 Atk. 133; Crispe *v.* Perrit, Willes, 467; Thomson *v.* Harding, 3 C. B. N. S. 254; Willson *v.* Gompartz, 11 Johns. 193. And therefore no judgment should be given against a bankrupt partner joined as defendant with his co-partners. Noke *v.* Ingham, 1 Wils. 89; Bovill *v.* Wood, 2 M. & S. 23; Booth *v.* Middlecoat, 6 Bing. 445; Ex parte Read, 1 Rose, 460; Ex parte Stanton, 1 M. D. & De G. 273; Ex parte Mills, L. R. 6 Ch. 594.

[3] See decision and reasons, Barclay *v.* Phelps, 4 Met. 397.

[4] Burnside *v.* Merrick, 4 Met. 537; Howard *v.* Priest, 5 Met. 582. See Rice, Appellant, 7 Allen, 112; Shearer *v.* Paine, 12 Allen, 289; Re Stevens, 1 Sawyer, 397, Fed. Cas. No. 13,393.

[5] Ex parte Leaf, 4 Dea. 287; Ex parte Morley, L. R. 8 Ch. 1026; Ex parte Dear, 1 Ch. D. 514; Ex parte Manchester Bank, 12 Ch. D. 917; Re Clap, 2 Lowell, 168, Fed. Cas. No. 2783; Farley *v.* Moog, 79 Ala. 148; Tillinghast *v.* Champlin, 4 R. I. 173.

to partnership creditors, and the separate assets to separate creditors.[1] In some States, statutes sever the debts upon the death of a partner, and this may vary the rule.[2]

§ 130. **Partners in a Single Adventure.** — It is hardly necessary to say that partners in a single adventure come under the rule, and that in case of the bankruptcy of one or more of them, the creditors of the adventure will have a lien on the joint assets.[3]

Two firms may, as such, become partners in a joint adventure or series of adventures, and upon questions of distribution the conjoint firm will be treated as if it were a single firm.[4]

§ 131. **Dormant Partners.** — If the firm contains a dormant partner, the creditors of the firm, who have no notice of the dormant partner, may elect to prove against the separate estate of the ostensible partner or partners.[5] It would seem that a like election exists in case of a merely nominal partner.[6]

In such a case, the proofs having been made as separate debts, there was a surplus of the joint estate, and the separate creditors of the ostensible partner succeeded to his lien, and were permitted to recoup themselves from the surplus before anything was paid to the separate creditors of the dormant partner.

§ 132. **Executor of Deceased Partner.** — The executor of a deceased partner stands precisely in the situation of his testator.[7] If money is, by order of the testator, left in the firm as capital, no proof can, of course, be made for that, or for any balance of account, except from the surplus, until all just debts are paid.[8] If money is left by order of the testator, or in ac-

[1] Craft *v.* Pyke, 3 P. Wms. 180; Addis *v.* Knight, 2 Mer. 117; Lodge *v.* Prichard, 1 De G. J. & S. 610; Gray *v.* Chiswell, 9 Ves. 118; Hills *v.* McRae, 9 Hare, 297; Re Gray, 111 N. Y. 404.

[2] Pearce *v.* Cooke, 13 R. I. 184; Sparhawk *v.* Russell, 10 Met. 305. Changed by statute in Massachusetts. Pub. Sts., c. 137, § 21; Jewett *v.* Phillips, 5 Allen, 150.

[3] Ex parte Brown, 3 Mont. & A. 471, 3 Dea. 91; Hobbs *v.* McLean, 117 U. S. 567.

[4] Re Hamilton, 1 Fed. Rep. 800. See Gilbert's Ass't, 94 Wis. 108.

[5] Ex parte Hodgkinson, 19 Ves. 291; Ex parte Norfolk, ib. 455; Ex parte Law, 3 Dea. 541.

[6] Ex parte Reid, 2 Rose, 84.

[7] Ex parte Carter, 2 Gl. & J. 233; Re Dixon, L. R. 10 Ch. 160.

[8] Ex parte Butterfield, De G. 570; Scott *v.* Izon, 34 Beav. 434.

cordance with the partnership articles, as a loan, its amount may be proved if the old debts are paid.[1] If the executor wrongly leaves money in the firm, it is a *devastavit*, which authorizes a proof, whether the old debts have been paid or not.[2]

§ 133. **Solvent Partner paying Joint Debts may prove.** — A solvent partner, though his co-partner had assumed the debts, cannot share in the joint assets of his bankrupt partner if any of the debts for which he is liable are outstanding, because he would be competing with his own creditors; nor against the separate assets, because the surplus of those assets will go to increase the joint assets.[3] But if he has paid the joint debts, he can prove against the separate estate, and if all the joint debts are paid in bankruptcy he can prove.[4] So if he is no longer bound for any joint debts, because the Statute of Limitations, or a release, protects him; or if he has been discharged in bankruptcy, and afterwards becomes a creditor of his former partner.[5]

§ 134. **Proof by Partners.** — In settling the estates of insolvent partners, whether in one proceeding or several, no contribution is to be allowed, or proof made, in respect to any inequality between the partners, whether in their contributions to capital or indebtedness to or from the firm, unless there is a surplus after paying the joint debts.[6]

To this rule there is the exception that, if one partner has fraudulently abstracted funds of the firm, there may be proof for that amount against his separate estate (or adjustment equivalent to proof, if the assignees of all the partners are the

[1] Ex parte Edmonds, 4 De G. F. & J. 488; Ex parte Coster, 6 L. T. N. S. 199.

[2] Ex parte Butterfield, De G. 570, 572; Ex parte Westcott, L. R. 9 Ch. 626.

[3] Scott v. Izon, 34 Beav. 484; Ex parte Ellis, 2 Gl. & J. 312; Ex parte Maude, L. R. 2 Ch. 550; Ex parte Collinge, 4 De G. J. & S. 533. See *infra*, § 182.

[4] Ex parte Watson, 4 Mad. 477; Ex parte Ogilvy, 2 Rose, 177.

[5] Ex parte Grazebrook, 2 Dea. & Ch. 186; Ex parte Hall, 3 Dea. 125.

[6] Ex parte Harris, 2 V. & B. 210; Ex parte Smith, 1 Gl. & J. 74; Ex parte Thompson, 2 M. D. & De G. 761; Ex parte Bass, 36 L. J. Bkcy. 39; Harmon v. Clark, 13 Gray, 114; Houseal's Appeal, 45 Penn. St. 484; Re Lane, 10 N. B. R. 135, Fed. Cas. No. 8044; Ex parte Butterfield, 1 De G. 570; Re McEwen, 12 N. B. R. 11, Fed. Cas. No. 8783. [The rule is otherwise under the act of 1898. See *infra*, § 468.]

same persons).[1] If, however, the other partners had knowledge, or means of knowledge, of the acts of the defaulting partner, and have taken no means to correct them, or if the funds were withdrawn under a general authority, though the authority were exceeded, his abstraction will be considered as a debt merely, and not provable. Drawings openly entered on the partnership books have been held a mere overdraft.[2]

If a partner has a debt for which an action at law could be maintained against his co-partner, as if the debt is wholly disconnected with the affairs of the partnership, or where a balance has been struck and acknowledged, he may bring a petition in bankruptcy against his co-partner,[3] but cannot receive a dividend until the joint debts are all paid.

§ 135. **Surplus.** — If there is a surplus of the separate estate of a partner, it goes to increase the joint assets.

If there is a surplus of joint assets, it is to be applied, first, to satisfy the lien of any partner or partners to whom the firm is indebted, and then to the separate estates, according to the interest of the several partners, as if the firm had been dissolved in any other way.[4] If the surplus of joint assets is insufficient to pay a partner his debt, his assignees may prove against the separate estates of the partners indebted to him.

A singular distinction prevails in that, to ascertain the surplus, joint creditors are entitled to interest before division is made, and separate creditors are not.[5] The discrepancy is accentuated by the rule that, in administration of the estate of a deceased insolvent, his separate creditors receive interest.[6]

[1] Ex parte Harris, 2 Ves. & B. 210 (*dictum*); Ex parte Lodge, 1 Ves. 166 (*dictum*); Lacey *v.* Hill, 4 Ch. D. 537; affirmed, *nom.* Read *v.* Bailey, 3 App. Cas. 94.

[2] Ex parte Smith, 1 Gl. & J. 74, 6 Madd. 2; Read *v.* Bailey, 3 App. Cas. 94, 98, per *Cairns, L. C.*

[3] Ex parte Richardson, 3 Dea. & Ch. 244; Ex parte Briggs, ib. 367.

[4] Ex parte King, 17 Ves. 115.

[5] Ex parte Reid, 2 Rose, 84; Ex parte Reeve, 9 Ves. 588; Ex parte Ogle, Mont. 350; Ex parte King, 17 Ves. 115; Ex parte Boardman, 1 Cox, 275; Ex parte Minchin, 2 Gl. & J. 287; Thomas *v.* Minot, 10 Gray, 263; Re Berrian, 6 Ben. 297, Fed. Cas. No. 1351; Ex parte Rix, Mont. 237; Pearce *v.* Slocomb, 3 Y. & C. Ex. 84; Ex parte Woodford, 3 De G. & S. 666. [This seems not to be the law under the act of 1898. See *infra*, § 468.]

[6] Ex parte Franklyn, Buck, 332; Re Dunkerson, 12 N. B. R. 391, Fed. Cas. No. 4159.

If the same bankrupt is a member of several firms, the surplus of his separate estate is distributed to them, or their assignees, *pro rata* of the amount of debts proved against each firm.[1]

§ 136. **Same Persons Partners in Different Places.** — If all the same persons are partners in different places, whether under the same or under different firm names, the assets are marshalled as if there were but one firm.[2] It has been thought that it would accord better with the theory of the rule, that the creditors of each firm should have a first claim against the assets of that firm,[3] but the decisions as yet are opposed to this modification.

§ 137. **Conversion of Joint into Separate Property, and vice versa; Ex parte Ruffin.** — In Ex parte Ruffin,[4] Lord Eldon decided that when partners had dissolved their firm in good faith, and the retiring partner had unconditionally assigned all the joint property to the remaining partner, who gave a binding covenant to pay the joint debts, then, upon the bankruptcy of the remaining partner, the joint creditors could not share in what had been the joint assets, because their lien depended on that of the retiring partner, who had relinquished it; that the assets had been lawfully severed, though the old debts remained joint.

Of the soundness of this decision, excepting when the partners are insolvent at the time of the transfer, there is no doubt.[5] In the principal case, the bankruptcy occurred about a year and a half after the dissolution. But the rule has been applied in the numerous cases cited below, in some of which the time was very short, only a week in one case, so that there could have been no intervening equities.

I cite, among others, cases of conversion of separate into joint estate, and of conversion in the ordinary course of trade, and upon the death of a partner, in accordance with valid partnership articles.[6]

[1] Ex parte Franklyn, Buck, 332; Re Dunkerson, 12 N. B. R. 391, Fed. Cas. No. 4159.

[2] Buckner *v.* Calcote, 28 Miss. 432.

[3] See decision of Daniel, J., reported at 28 Miss. 447, note.

[4] 6 Ves. 119.

[5] See *infra*, § 139.

[6] Ex parte Williams, 11 Ves. 3; Ex parte Peake, 1 Madd. 346; Ex parte Clarkson, 4 Dea. & Ch. 56; Ex parte Fry, 1 Gl. & J. 96; Ex parte Owen, 4

The flagrant injustice of the result, in many cases, of giving the separate creditors the joint property, has led to exceptions, distinctions, and modifications which we will now consider. If the arrangement has not been completed, bankruptcy works a revocation, or stay, which leaves to the joint creditors all their rights; as where a suit was pending to adjust the partnership affairs, or where the property had not been fully delivered, or certain security which had been agreed on had not been given.[1] So, if there has been any fraud by the remaining upon the retiring partner, the joint creditors may, in bankruptcy, set aside the arrangement.[2] So where the capital of a deceased partner was used in the trade by two of his executors, and the will authorized such action by three.[3]

If it is possible to construe the deed or agreement not to be a waiver of the lien, it will not be lost, as if the undertaking of the continuing partner is to pay out of the joint property, or simply to pay as liquidating partner, or if there be a dissolution merely.[4]

§ 138. **Ex parte Ruffin, continued.** — The joint creditors may, in England, assent to the arrangement at any time before their debtor's bankruptcy (but not afterwards), by acts, or by parol as well as by writing, and very slight evidence of such assent is enough. If they have assented, they share in the assets.[5]

De G. & S. 351; Ex parte Gurney, 2 M. D. & De G. 541; Re Simpson, L. R. 9 Ch. 572; Howe *v.* Lawrence, 9 Cush. 553; Robb *v.* Mudge, 14 Gray, 534; Russell *v.* McCord, 17 N. B. R. 508, Fed. Cas. No. 12,157; Thomas *v.* Minot, 10 Gray, 263; Re Wiley, 4 Biss. 214, Fed. Cas. No. 17,656.

[1] Ex parte Wheeler, Buck, 25; Re Colbeck, ib. 48; Ex parte Cooper, 1 M. D. & De G. 358; Ex parte Wood, 10 Ch. D. 554; Ex parte Clarkson, 4 Dea. & Ch. 56. In England debts are not considered to be transferred until notice to the debtors, which illustrates the principle, though the reason that such debts are within the order and disposition of the old firm is not law in this country. Ex parte Monro, Buck, 300; Ex parte Burton, 1 Gl. & J. 207; Ex parte Usborne, ib. 358.

[2] Ex parte Rowlandson, 1 Rose, 416, 2 Ves. & B. 172; Ex parte Johnson, 2 Lowell, 129, Fed. Cas. No. 7369.

[3] Ex parte Butcher, 12 Ch. D. 917, 13 Ch. D. 465; Ex parte Morley, L. R. 8 Ch. 1026.

[4] Ex parte Fell, 10 Ves. 347, per *Eldon, L. C.*; Re Shepard, 3 Ben. 347, Fed. Cas. No. 12,754; Ex parte Cooper, 1 M. D. & De G. 358; Ex parte Leaf, 4 Dea. 287; Harmon *v.* Clark, 13 Gray, 114; Fitzgerald *v.* Christl, 20 N. J. Eq. 90.

[5] Ex parte Williams, Buck, 13; Ex parte Freeman, ib. 471; Ex parte Gurney, 2 M. D. & De G. 541; Thompson *v.* Percival, 5 B. & Ad. 925; Oakeley *v.* Pasheller, 4 Cl. & Fin. 207; Hart *v.* Alexander, 2 M. & W. 484; Lyth *v.* Ault, 7 Exch. 669; Ex parte Lane, De G. 300; Ex parte Jackson, 2 M. D. & De G. 146.

Similar decisions have been made in the United States, but others hold that there must be a special new promise.[1]

It was early pointed out by the Vice-Chancellor of England that it would be consistent with the course of equity to permit the creditors to assent even after the bankruptcy of the debtor;[2] but he was bound by authority to deny this right. Similar observations were made in another case. This suggestion has been adopted by statute in Massachusetts,[3] and by several decisions in the United States,[4] which appear to rest on strong reasoning. It is true that the rights of all parties are usually fixed at the bankruptcy, but where there is no possibility of fraud, and no act to be done by the bankrupt, but only the exercise of an election by the creditor, there seems good cause for departing from the general rule, and admitting the strong particular equity.

§ 139. **American Rule.** — Since the effect of a transaction like that in Ex parte Ruffin is to distribute the assets in a mode different from that adopted in bankruptcy, it is held in the United States that if the transfer is made when the firm is insolvent, and within the time before bankruptcy, when preferences are assailable, it is a preference, or like a preference, of those creditors who will be benefited by it, and therefore void as against those injured.[5] And even in England it would seem that if an act of bankruptcy was contemplated at the time of the conveyance, it might be set aside by the court of bankruptcy.[6]

[1] See Backus *v.* Fobes, 20 N. Y. 204; Harris *v.* Lindsey, 4 Wash. C. C. 271, Fed. Cas. No. 6124; Wild *v.* Dean, 8 Allen, 579.

[2] Ex parte Freeman, Buck, 471.

[3] Stat. 1865, c. 113, now Pub. Sts., c. 157, § 125; Bucklin *v.* Bucklin, 97 Mass. 256.

[4] Hoyt *v.* Murphy, 18 Ala. 316; Re Downing, 1 Dillon, 33, Fed. Cas. No. 4044; Re Rice, 9 N. B. R. 373, Fed. Cas. No. 11,750; Re Long, 9 N. B. R. 227, Fed. Cas. No. 8476.

[5] Collins *v.* Hood, 4 McLean, 186, Fed. Cas. No. 3015; Ex parte Shouse, Crabbe, 482, Fed. Cas. No. 12,815; Re Byrne, 1 N. B. R. 464, Fed. Cas. No. 2270; Phillips *v.* Ames, 5 Allen, 183; Re Tomes, 19 N. B. R. 36, Fed. Cas. No. 14,084; Re Cook, 3 Biss. 122, Fed. Cas. No. 3150; Re Waite, 1 Lowell, 207, Fed. Cas. No. 17,044; Re Johnson, 2 Lowell, 129, Fed. Cas. No. 7369; Goodbar *v.* Cary, 16 Fed. Rep. 316. See *infra*, § 468.

[6] Ex parte Mayou, 4 De G. J. & S. 664. Compare Ex parte Walker, 4 De G. F. & J. 509; Ex parte Kemptner, L. R. 8 Eq. 286; Anderson *v.* Maltby, 2 Ves. p. 244. See per *Lord Eldon* in

In some States the partnership creditors are held to have an equitable claim upon the joint assets, if the firm is insolvent, even though no bankrupt law is in operation; and they may work it out in spite of an attempted transfer by one partner to the other.[1] But the general opinion is that the conversion is valid, unless it contravenes some law in the nature of a bankrupt law.[2]

§ 140. **Firm taking in New Partners.** — Similar questions arise when a firm has taken in new partners, or has substituted new partners for old ones who had retired, and the new firm has become bankrupt. Then the question is whether a creditor of the old firm has agreed to take the new firm as his debtor. Here, also, slight evidence of the novation is sufficient.[3] No fresh consideration is necessary.[4]

But the evidence is to be weighed, and if, on the whole, it is not sufficient to prove a novation, the creditor cannot prove against the assets of the new firm.[5]

In considering the cases cited, it is to be borne in mind that the credit of the new firm may be taken as security for the old debt, in which case, if there has been a sufficient consideration, the creditors may proceed against both.

§ 141. **Assignment for Creditors.** — In the United States a general assignment by partners, in trust for creditors, is an admission of insolvency, and it is held that the application in such an assignment of joint property to pay the individual debts of the partners is a fraud on the creditors of the firm.[6]

Ex parte Williams, 11 Ves. 3; Bowker v. Burdekin, 11 M. & W. 128; Ex parte Snowball, L. R. 7 Ch. 534. But insolvency alone will not avoid the conversion. Ex parte Peake, 1 Madd. 346; Ex parte Carpenter, Mont. & Mc.A. 1.

[1] Wilson v. Robertson, 21 N. Y. 587; Ransom v. Van Deventer, 41 Barb. 307; Gay v. Johnson, 32 N. H. 167; Elliot v. Stevens, 38 N. H. 311; Flack v. Charron, 29 Md. 311; Menagh v. Whitwell, 52 N. Y. 146; Bulger v. Rosa, 119 N. Y. 459, per *Andrews, J.*

[2] See Case v. Beauregard, 99 U. S. 119; Fitzpatrick v. Flannagan, 106 U. S. 648; Huiskamp v. Moline Wagon Co., 121 U. S. 310; Locke v. Lewis, 124 Mass. 1.

[3] Rolfe v. Flower, L. R. 1 P. C. 27; Ex parte Williams, Buck, 13; Shaw v. McGregory, 105 Mass. 96; Re Isaacs, 3 Sawyer, 35, Fed. Cas. No. 7093.

[4] See Williams v. Shelly, 37 N. Y. 375.

[5] See Re Smith, Knight, & Co., L. R. 4 Ch. 662.

[6] Wilson v. Robertson, 21 N. Y. 587; Bulger v. Rosa, 119 N. Y. 459, per Andrews, J. [Under the act of 1898 such an assignment would be an act of bankruptcy, § 3 a (4). See *infra*, § 466.]

But such creditors, if they have assented to the arrangement, cannot complain, and the separate creditors, being benefited, have no equity.[1]

It is not so universally admitted that the partners may not assign their separate property to pay the debts of the firm.[2] The reason for the decisions in favor of such an assignment is that the several partners are bound for the debts of the firm, and in the absence of a bankrupt law, or of bankruptcy proceedings, the partners may pay their debts in such order as they please.

In the absence of express stipulations to the contrary, the courts will construe the assignment as intended to marshal the assets according to the usual rule.[3]

[1] Read *v.* Baylies, 18 Pick. 497; Haynes *v.* Brooks, 116 N. Y. 487.

[2] Validity of such disposition. Newman *v.* Bagley, 16 Pick. 570.

[3] Moody *v.* Downs, 63 N. H. 50.

CHAPTER VII.

EXAMINATION OF THE BANKRUPT AND OTHERS IN RESPECT TO THE AFFAIRS OF THE BANKRUPT.

§ 142. **Examinations in Bankruptcy.** — All systems of bankruptcy, in England and this country, have contained provisions for a summary inquisition into all the affairs and estate of the bankrupt, not only by examining him, but his wife, and others who have information upon the subject, or who are supposed to be indebted to him, or to be concealing his assets. The main purpose of the proceedings often is to obtain evidence against the party examined, or to ascertain that there is no such evidence.[1] In some of the statutes it is confined to persons suspected of concealing assets.[2] It is important to bear in mind, throughout this discussion, that the power of examination is wholly different from the power to summon witnesses upon an issue pending, and that a general discovery is intended. The use of the word "witness" is unfortunate, and has sometimes led to mistakes.

§ 143. **Public or Last Examination.** — The statutes in England have usually provided for two kinds of examination of the bankrupt, one public and the other private, — the former peremptory, the other optional with the assignees or others interested. It is a condition precedent to the bankrupt's discharge under these statutes that he should be publicly examined at a fixed time by the commissioner, or other proper officer of the court, or under his direction. This was called his "last examination," because the optional private examinations, if made, were to be before this final purgation.[3] It was at this examination that the bankrupt was to furnish his accounts and surrender

[1] 1 Christian, Bankruptcy, 2d ed., p. 375. See Robson, 7th ed., p. 582; Ex parte Alexander, 1 De G. J. & S. 311.

[2] Act of 1800, § 24; 2 Stat. 28.

[3] Eden, Bankruptcy, 2d ed., p. 382.

all property not before given up, and he could be in no criminal default until he had failed to account at this time. The origin of the practice was that the proceedings were always *in invitum* and *ex parte*, and he was afforded this time to conform. In this country a very large proportion of the proceedings are by the debtor himself, and those which are not, are taken with ample notice to him, and after hearing his defence; and, consequently, our practice requires the bankrupt to file his schedule and inventory, and in them to make a full statement of his debts and assets when he files his petition, or when the adjudication is made against him.[1] There is, therefore, in this country nothing which corresponds exactly with the "last examination" of the English books, — none, that is, which must be had in all cases, before the discharge or before the bankrupt can be held to be in default. But any creditor may have an order for the examination of the debtor at any time before his discharge; and the examinations themselves are for a like purpose in both countries, the discovery of assets and other matters of interest to the creditors.[2]

§ 144. **Whether Debtor can be examined before Adjudication.** — Under our late law it was once held that one against whom a petition for adjudication has been filed is already a bankrupt, and must submit to examination, if required by the court, though such an order would not often be made.[3] This construction appears to me opposed to the meaning and intent of the statutes, which are to discover the dealings of one whose estate is under the charge of the court for distribution. Until he is judicially found to be a bankrupt, he is no more bound to "submit to examination" than the other party to the action; both stand on their legal and usual rights, and are

[1] Act of 1867, §§ 11, 43; 14 Stat. 521, 538; R. S. §§ 5014, 5030.

[2] Act of 1867, § 26; 14 Stat. 529; R. S. § 5086; Act of 1898, § 21 a; *infra*, § 484.

[3] Re Bromley, 3 N. B. R. 686; Re Salkey, 5 Biss. 486, Fed. Cas. No. 12,252; Re Mendenhall, 9 N. B. R. 285, Fed. Cas. No. 9423. See, under Stat. 1841, Re Heusted, 5 Law Rep. 510, Fed. Cas. No. 6440, where interrogatories were permitted to be filed, and thus indirectly the bankrupt was made to disclose, as in any case in equity. This order might be defended on general grounds of equity practice, but is put upon what I venture to call too broad a construction of the statute.

governed by precisely the same law, and may testify for themselves, or be required to testify for their opponents, when the issue is tried, and not before. The law of Massachusetts and of Canada agrees with what I consider to be the true rule;[1] and so does the practice, as far as I am acquainted with it. In voluntary bankruptcy the adjudication is a matter of course after the petition is filed, and though the court will usually postpone the examination until an assignee is chosen, there is no legal objection to the order at any time after adjudication.[2]

§ 145. **Examination of Bankrupt.** — The bankrupt, after adjudication, is bound to surrender all the assigned estate, and to do all acts which may be required of him, and to be ready at all times until his discharge to aid the assignees in this respect. The late statute provided that these things were to be done at the expense of the estate;[3] but it was held that he was not entitled to fees and expenses as a witness, which seems a harsh rule.[4] After his discharge he stands like any other witness, and cannot be required to submit, as a bankrupt, to examination.[5] When a composition is effected before the appointment of an assignee, it is not the practice to order an examination of the bankrupt before the time of meeting, because the statute says he shall attend the meeting and answer all inquiries then and

[1] Re Jordan, 9 Met. 292; Clarke, Insolvent Acts, 126. See *infra*, § 470.

[2] Re Lee, 4 Law Rep. 486, Fed. Cas. No. 8178; Re Parker *et al.*, 1 Penn. L. J. 370, Fed. Cas. No. 10,722.

[3] Act of 1867, § 28; 14 Stat. 530; R. S. § 5101.

[4] Re Okell, 2 Ben. 144, Fed. Cas. No. 10,474; Re McNair, 2 N. B. R. 219, Fed. Cas. No. 8907. The rule is different under the act of 1898. See *infra*, § 470.

[5] Re Dole, 11 Blatch. 499, Fed. Cas. No. 3964; Re Dean, 3 N. B. R. 768, Fed. Cas. No. 3701; Re Jones, 6 N. B. R. 386, Fed. Cas. No. 7449; Re Witkowski, 10 N. B. R. 209, Fed. Cas. No. 17,920. These cases mean that the bankrupt is not bound to keep himself in readiness, nor to attend without fees, etc. There is no limit of time in the examination of witnesses, excepting the final settlement of the estate; and there is no reason for exempting the discharged bankrupt from an obligation which remains upon all other persons. Therefore, while he is not bound to remain within the jurisdiction, and is entitled to fees of attendance, etc., and therefore is not in the attitude of a bankrupt, after his discharge he is bound to answer as a witness not merely in cases, but as to matters newly discovered or newly arising concerning his estate. Our law is therefore substantially like that of England, under 6 Geo. IV., c. 16, § 116, that the bankrupt might be examined after he had received his certificate, but should be entitled to a *per diem* allowance therefor.

there.[1] The officers of a bankrupt corporation are like an individual bankrupt in respect to examinations concerning the company's affairs.

§ 146. **Bankrupt in Prison or out of Jurisdiction.** — If the bankrupt is imprisoned within the district, the judge may cause him to be brought up for examination by *habeas corpus*.[2] The same can be done for any other witness, through the general power of the court. If the deponent is out of the district, the court where the proceedings are pending may order the examination by interrogatories, or may appoint a commissioner or examiner to take the deposition orally;[3] and the courts of the United States where the witness is found have jurisdiction to enforce such orders.

§ 147. **Examination at Meetings without Special Order.** — The bankrupt, and perhaps other persons attending a meeting, may be examined there *viva voce*, or as the register may direct, without a previous order.[4] In case of the bankrupt's wife, the statute, and in that of other witnesses, the practice, requires that cause be shown for the first as well as for subsequent examinations.[5] All but the bankrupt must have their fees and expenses paid or tendered.[6] Witnesses should attend at the time and place appointed, and not depart without leave of the court or register.[7]

§ 148. **Examination of Assignees and Creditors.** — Every assignee may be examined touching his management of the

[1] Ex parte Levy, L. R. 11 Eq. 619; Re Bennett, 3 Ch. D. 315; Ex parte Jewett, 2 Lowell, 393, Fed. Cas. No. 7303. [Under the act of 1898 a composition cannot be offered by a bankrupt till after he has been examined. See *infra*, § 475.]

[2] Act of 1867, § 26; 14 Stat. 529; R. S. § 5089. [This is provided for by Rule XXX. See *infra*, § 472.]

[3] [Act of 1898, § 21 b, c, provide for depositions.]

[4] This was expressly provided by several of the English statutes, but has been omitted from that of 1869. 2 Taylor Ev., 6th ed., § 1174, but the practice is probably the same. See Re Bromley, 3 N. B. R. 686.

[5] See the remarks of a judge of great ability and experience upon the danger of permitting witnesses to be harassed or examined except upon good cause. Ex parte Alexander, 1 De G. J. & S. 311.

[6] Mercer's Case, 2 Sm. & G. 87, 5 De G. M. & G. 26; but not counsel fees, unless in special cases: Re Leighton, L. R. 1 Ch. 331; Ex parte Waddell, 6 Ch. D. 328.

[7] Wright v. Maude, 10 M. & W. 527.

estate and his accounts, though the order is not of course.[1] A creditor who has proved, or offered to prove, his debt may be examined concerning it by the assignees, or by any other creditor, or by the bankrupt.[2] But if a creditor has no security, and does not intend to prove his debt, there is no occasion or authority to examine him about it.[3] If he has security, the assignees have a right to ascertain its validity and amount with a view to their own action in redeeming or contesting it;[4] and he is bound to produce his mortgage deed, or the papers on which he has a lien, though the purpose of the examination may be to contest his claim.[4]

§ 149. **Who may examine.** — A creditor, or the assignees as representatives of the creditors, may have an order for examination of any one who is subject to be examined.[5] "Creditor" means one who has taken proper steps to have his debt admitted to proof; and an objection to his debt should not avail to exclude him from this right, unless it is probable that he has no debt at all, for its amount is quite immaterial.[6] One who is interested as a contributory to the debts of a corporation may examine creditors offering proofs, because the amount of his liability depends upon the total amount of the debts.[7] The bankrupt is in like manner interested to diminish the amount of his liabilities, in case he should not obtain his discharge, or where that or the amount of his allowance may depend upon the rate of dividend, or the assent of creditors, or where the statute makes him responsible for permitting false debts to be

[1] Ex parte Perryer, 1 M. D. & De G. 276; Ex parte Lawrence, 1 De G. J. & S. 307; Ex parte Crossley, L. R. 13 Eq. 409; Re Smith, 14 N. B. R. 432, Fed. Cas. No. 12,988. So a receiver appointed by a State court. Re Hulst, 7 Ben. 40, Fed. Cas. No. 6864.

[2] Act of 1867 § 22; 14 Stat. 527; R. S. § 5081. [In England a petitioning creditor must be present at the hearing and submit to cross-examination. Re Purrett, 2 Manson, 403.]

[3] Re Accid., etc. Co., L. R. 5 Eq. 22.

[4] 2 Christian, 2d ed., 110; Ex parte Caldecott, Mont. 55; Ex parte Herbert, 13 Ves. 183, 189. See the discussion in Ex parte Trueman, 1 Dea. & Ch. 464.

[5] Ex parte Lawrence, 6 L. T. N. S. 559; Re Ray, 2 Ben. 53, Fed. Cas. No. 11,589; Chamberlain *v.* Hall, 3 Gray, 250; Act of 1898, § 21 a.

[6] See Re Belden, 4 Ben. 225, Fed. Cas. No. 1238. [A creditor who has not proved cannot examine. Madison *v.* Piper, 53 Pac. Rep. 395 (Idaho).]

[7] Lindley, Companies, 5th ed., p. 689.

proved, and he may, therefore, examine creditors in these cases.[1] It will be illegal for the assignees to agree not to examine a bankrupt, though in consideration of a sum of money to be added to the assets, unless the sum were enough to pay all the debts.[2] For any one else to accept money for such a purpose would be not only illegal, but fraudulent.

§ 150. **Whether the Bankrupt can examine his Assignees.** — Whether the bankrupt has a right to examine his assignees concerning their settlement of the estate is more doubtful. Several of the statutes required the assignees to account to the bankrupt, and to pay him the surplus of the estate;[3] but they appear to have been somewhat narrowly interpreted as meaning that they must account to him if there was or ought to have been a surplus.[4] On principle, the bankrupt should have this right, subject to the direction of the court, because he has an interest to increase his assets as well as to diminish his liabilities.

§ 151. **The Proceeding is judicial; Privilege from Arrest.** — The examination is a judicial proceeding, and all parties and witnesses are protected from arrest upon civil process in going to, staying at, and returning from it, as in other courts. This is a right at common law beside and beyond the protection given to the bankrupt by the statute, and shields him from arrest, at the suit of the crown, or upon an outlawry, or for an attachment for not paying money into court.[5] The husband of a witness attending with her has been held to be within the

[1] Act of 1867, § 22; 14 Stat. 527; R. S. § 5081 [but see Re Beall (1894), 2 Q. B. 135].

[2] Nerot *v.* Wallace, 3 T. R. 17.

[3] 13 Eliz., c. 7, § 4; 1 Jac. I., c. 15, § 15; 6 Geo. IV., c. 16, § 132.

[4] Ex parte Ryley, 4 Dea. & Ch. 50; Ex parte Dinsdale, 4 De G. M. & G. 873; Ex parte Newhouse, 1 M. D. & De G. 508; Ex parte Malachy, ib. 353; Ex parte Tarleton, 2 M. D. & De G. 189; Ex parte Lomas, 3 Dea. & Ch. 681; Ex parte Bayley, Mont. 208; Ex parte Austin, 4 Ch. D. 13.

[5] Ex parte Parker, 3 Ves. 554 Arding *v.* Flower, 8 T. R. 534; Ex parte King, 7 Ves. 312; Ex parte Jackson, 15 Ves. 116; Ex parte Russell, 19 Ves. 163; List's Case, 2 Ves. & B. 373; Ex parte Clarke, 2 Dea. & Ch. 99; Ex parte Burt, 2 M. D. & De G. 666; Ex parte Helsby, Mont. 355; Re McWilliams, 1 Sch. & Lef. 169. So creditors from another State attending in New York to prove debts at the first meeting are privileged from summons. Matthews *v.* Tufts, 87 N. Y. 568.

privilege;[1] so is the attorney or solicitor of a party or witness.[2] There is no protection from arrest upon a criminal proceeding,[3] though it take the form of a fine (which, perhaps, might be provable).[4] An arrest of the person privileged is a contempt, for which the party, his attorney, and the officer, if duly warned, are liable.[5] The application for release is more properly made to the court of bankruptcy, though any other, such as the Circuit Court, having jurisdiction to issue the writ of *habeas corpus*, may be applied to.[6] It is not an *ex parte* application, but notice should be given to the plaintiff in the action, and, if he fails to appear, to the officer, in order that the party may have a day in court, and show cause against the release, and thus be bound by the order.[7]

As a judicial proceeding, the publication of the examination cannot be libellous; and a warrant for not appearing will not subject the party moving for it to an action for false imprisonment;[8] when the commissioners were only like magistrates, they were protected while acting within the limits of their authority, though their judgment should be erroneous.[9]

§ 152. **Order for Examination and Service thereof.** — The order for an examination is always made *ex parte*;[10] it may be made by the register, and be served by any one; but the service should be personal.[11] One examination of the bankrupt

[1] Ex parte Britten, 1 M. D. & De G. 278.

[2] Gascoygne's Case, 14 Ves. 183; Castle's Case, 16 Ves. 412.

[3] Ex parte Jayes, 3 Des. & Ch. 764.

[4] Bancroft *v.* Mitchell, L. R. 2 Q. B. 549.

[5] Ex parte King, 7 Ves. 312.

[6] In some of the English cases the courts of common law have refused to entertain the application; but I understand the better opinion to be as stated in the text. Arding *v.* Flower, 8 T. R. 534, modifying Kinder *v.* Williams, 4 T. R. 377. See List's Case, 2 V. & B. 373; Plomer *v.* McDonough, 1 De G. & Sm. 232; Walker *v.* Webb, 3 Anst. 941.

[7] Ex parte Byne, 1 V. & B. 316.

[8] Ryalls *v.* Leader, L. R. 1 Ex. 296; Cooper *v.* Harding, 7 Q. B. 928.

[9] Doswell *v.* Impey, 1 B. & C. 163.

[10] Re English J. S. Bank, L. R. 3 Eq. 203; Re Smith, L. R. 4 Ch. 421; Fricker's Case, L. R. 13 Eq. 178; Re McIntire, 1 Ben. 277, Fed. Cas. No. 8821; Re Frisbie, 13 N. B. R. 349, Fed. Cas. No. 5131. An order should always be entered according to form 45. Re Lanier, 2 N. B. R. 154, Fed. Cas. No. 8070; Re Brant, 2 N. B. R. 215, Fed. Cas. No. 1812; Re McIntire, 1 Ben. 277, Fed. Cas. No. 8821.

[11] Re Brant, 2 N. B. R. 215, Fed. Cas. No. 1812; Re Vetterlein, 4 N. B. R. 599, Fed. Cas. No. 16,926; Re Pioneer

will be ordered, as of course, upon oral or written application, seasonably made.[1] In England, the assignees' application need not be under oath, while that of a creditor must be.[2] There is power to order several examinations, but the court will exercise it cautiously to avoid vexation and oppression, and will always require cause to be shown for a second or third order, or for one which is applied for after the time for discharge has arrived;[3] where, by accident, an examination is left incomplete, a new order will be granted;[4] and where there is any miscarriage, it should be corrected at the time; it will not be a reason for refusing the discharge that questions were left unanswered, or that any irregularity has occurred which might have been thus corrected.[5] The service of the summons should be personal,[6] giving a reasonable time for obeying it;[7] and if the bankrupt or other witness fail to appear, or refuse to be sworn, or to answer lawful questions, or to sign the deposition, he may be committed[8] by the judge, not by the register.[9] Where there is an honest refusal to answer a question, there would be no actual contempt, and the judge would decide the point upon a rule to show cause; or the register may certify the question to the judge, like other questions of law; this is

Paper Co., 7 N. B. R. 250, Fed. Cas. No. 11,178; Gordon v. Scott, 2 N. B. R. 86, Fed. Cas. No. 5620; Re Hodges, 11 N. B. R. 369, Fed. Cas. No. 6562.

[1] Kimball v. Morris, 2 Met. 573; Re Gilbert, 1 Lowell, 340, Fed. Cas. No. 5410; Re Solis, 4 Ben. 143, Fed. Cas. No. 13,165, explaining some earlier cases in the same court; Re McBrien, 2 Ben. 513, Fed. Cas. No. 8665.

[2] 32 & 33 Vict., c. 71, § 96, rule 171. The distinction has sometimes been made in this country, though there appears no very good ground for it. Re Adams, 2 Ben. 503, Fed. Cas. No. 39. But this case was afterwards said to mean that the register had discretion to require an oath. Re Solis, 4 Ben. 143, Fed. Cas. No. 13,165.

[3] Re Gilbert, 1 Lowell, 340, Fed. Cas. No. 5410; Re Frisbie, 13 N. B. R. 349, Fed. Cas. No. 5131; Re Isidor, 2 Ben. 123, Fed. Cas. No. 7105.

[4] Re Van Tuyl, 2 N. B. R. 70, Fed. Cas. No. 16,881. See Re Robinson, 2 N. B. R. 516, Fed. Cas. No. 11,942.

[5] Blanchard v. Young, 11 Cush. 341; Re Littlefield, 1 Lowell, 331, Fed. Cas. No. 8398.

[6] Because a substituted service will not be good foundation for an attachment. Re Sandys, 3 Dea. & Ch. 34.

[7] Groocock v. Cooper, 8 B. & C. 211.

[8] Ex parte Clifton, 7 Morrell, 59; Re Batson, 1 Manson, 45; Act of 1867, § 7; 14 Stat. 520; R. S. §§ 5005, 5006; Act of 1898, § 41 b.

[9] Act of 1867, §§ 4, 5; 14 Stat. 519; R. S. §§ 4999, 5002.

usually done at the close of the examination, when all points of this kind may be heard together.[1]

§ 153. **Production of Books and Papers.** — The witness must produce such books and documents as he is ordered to produce, and must permit their inspection if they contain entries bearing upon the examination, and must inspect such records as are within his power, to enable him to answer fully.[2] He is not in contempt for refusing to read an entry in a book needing no explanation, because the register and parties can read it for themselves.[3] If there is an objection to the regularity of the service, or other matter, which goes to the whole examination, the witness may refuse to be sworn.[4] But, generally speaking, the witness is not to assume that he can give no information, or that illegal questions will be put; and he must be sworn, and wait until some such occasion arises before making objection.[5]

§ 154. **Mode of Examination.** — The examination is to be in writing, which means that it is to be written down by the register or a clerk.[6] It is not to be by interrogatories filed or

[1] It has been held that a witness is not a "party" within § 5110, which requires the register to certify every point raised by a party to the proceedings, but that the opinion may be taken by consent under § 5111. See Re Fredenburg, 2 Ben. 133, Fed. Cas. No. 5075; Re Comstock, 13 N. B. R. 193, Fed. Cas. No. 3080; Re Patterson, 1 Ben. 508, Fed. Cas. No. 10,815; Re Levy, 1 Ben. 496, Fed. Cas. No. 8296. I submit that a person under examination is a party in the strict sense. It would be very inconvenient to have every disputed question certified separately, and the practice is for the register to rule for the time being, though he cannot compel obedience; and if at the end any questions remain unanswered which the examining creditor or assignee still insists ought to be answered, they may be referred to the court, whichever way the register may have ruled upon them. Under this practice it is of no great importance whether the witness is called a party or not, as he maintains his rights by refusing to answer, and the other party must always bring up the question.

[2] Ex parte Trueman, 1 Dea. & Ch. 464; Stone's Case, 3 De G. & S. 120; Re Earle, 3 N. B. R. 304, Fed. Cas. No. 4244; Re Burgoyne, 8 Morrell, 139. See Re Higgs, 66 L. T. 296.

[3] Isaac *v.* Impey, 10 B. & C. 442.

[4] Re Dole, 11 Blatch. 499, Fed. Cas. No. 3964.

[5] Ex parte Meymot, 1 Atk. 196; Nobes *v.* Mountain, 7 Moore, 39; Ex parte Bunn, 3 Jur. N. S. 1013; Re Woodward, 3 N. B. R. 719, Fed. Cas. No. 17,999; Church *v.* Choate, 9 Allen, 573; Swan's Case, L. R. 10 Eq. 675; Re Smith, L. R. 4 Ch. 421; Fricker's Case, L. R. 13 Eq. 178.

[6] Act of 1867, §§ 5, 26; R. S. §§ 5004, 5086, 5087, rule 12; Re Bromley, 3 N. B. R. 686; Re Tanner, 1 Lowell, 215, Fed. Cas. No. 13,745. See *infra*, § 484.

submitted, unless by special order of the court, because that mode of examination would be likely to defeat the purpose of the inquiry.[1] For a similar reason, the witness is not usually permitted to consult his counsel upon the questions put;[2] though all these matters are within the regulating power of the court and register. He has the right to be cross-examined upon the matters propounded in chief, but not on independent subjects, and should have every reasonable opportunity for explanation.[3] The register may adjourn the examination from time to time in his discretion.[4]

§ 155. **Deponent may have Counsel.** — The deponent has the right to be attended by counsel, who may object to improper questions, and cross-examine his client upon the subjects opened in direct examination. In a few cases, a distinction is taken that the bankrupt has this right, and any other person may have counsel only as matter of grace on the part of the magistrate; but there is no distinction in principle, because the examination is evidence against the deponent, and is usually taken for the very purpose of being so used, and justice requires that his rights should be cared for.[5] How far there

[1] Ex parte Crump, 1 Ch. D. 530; Re Tanner, 1 Lowell, 215, Fed. Cas. No. 13,745; Re Lord, 3 N. B. R. 243, Fed. Cas. No. 8502, and see next note.

[2] The practice under the insolvent law of Massachusetts gave the bankrupt a strict right to consult counsel upon every interrogatory: Ex parte Winsor, 8 Law Rep. 514; but the practice was otherwise under the bankrupt law, and, historically considered, it is clear that our practice is right under our statute. The statute formerly required interrogatories to be filed, but this was changed by 21 Jac. I., c. 19, § 9, which authorizes the commissioners to examine as well by word of mouth as in writing, etc., which has been followed in the later English statutes and in ours: Act of 1867, § 38; 14 Stat. 535; R. S. § 5003; and of course in an oral examination there could be no consultation: see Re Patterson, 1 N. B. R. 125, Fed. Cas. No. 10,815; Re Tanner, 1 Lowell, 215, Fed. Cas. No. 13,745; Re Judson, 2 Ben. 210, Fed. Cas. No. 7562; Re Lord, 3 N. B. R. 243, Fed. Cas. No. 8502.

[3] The examination should be neither friendly nor hostile, but full, fair, and searching, with opportunity for explanation. Per *Coleridge, J.*, Ex parte Legge, 22 L. J. Q. B. 345; Ex parte Lee, 2 Mont. & A. 15; Norris's Case, 2 J. & W. 437.

[4] Ex parte Till, L. R. 10 Ch. 631; Ex parte Crump, 1 Ch. D. 530.

[5] "A barrister or solicitor is generally or always permitted to attend a bankrupt or witness," 1 Christian, 2d ed., 385 (1818). And Eden, 2d ed., p. 89, says that the attendance of counsel on behalf of a witness was formerly considered a matter of favor, but is now (1825) never refused, and probably never will be. He cites for the old law Ex parte Parsons, 1 Atk. 204.

The undoubted right to be cross-

shall be consultation between attorney and witness is a matter of discretion with the judge or register.[1] The better practice is to inform a witness who is not the bankrupt, through a petition to the court, or otherwise, of the subjects upon which information is expected from him, though, if he is thought to have acted fraudulently, the court might dispense with notice.[2]

§ 156. **Examination as Evidence.** — The examination may be properly used for discovery against the witness, of frauds as well as debts, and, therefore, it is no objection that a civil action is pending against him concerning the same matters, or that the answers will prove civil fraud,[3] or will disclose the witness' own defence against the assignees.[4] It is likewise lawfully used for information, and therefore it is not a valid objection that no action is pending by which to test the materiality of the questions.[5] The true test is whether the answer

examined would be futile if counsel could not attend to conduct it. I therefore cite the cases which declare that right, and others directly to the point, and still others in which the practice appears incidentally. They make up a body of authority which is as conclusive as the reasoning. Lee on Bankruptcy, 2d ed., p. 133; Ex parte Bunn, 3 Jur. N. S. 1013; Re Tanner, 1 Lowell, 215, Fed. Cas. No. 13,745; Re Noyes, 2 Lowell, 352, Fed. Cas. No. 10,370; Re Bragg, 5 Law Rep. 323, Fed. Cas. No. 1799; Re Leachman, 1 N. B. R. 391, Fed. Cas. No. 8157; Ex parte Winsor, 8 Law Rep. 514; Goss *v.* Quinton, 3 M. & G. 825; Ex parte Mackenzie, L. R. 10 Ch. 88; Nobes *v.* Mountain, 7 Moore, 39, 3 B. & B. 233; Re Leighton, L. R. 1 Ch. 331; Ex parte Waddell, 6 Ch. D. 328; Re Breech Loading Arms Co., L. R. 4 Eq. 453; Re Merchants' Co., ib. 454; Re Brampton, etc. R. Co., L. R. 11 Eq. 428.

For cases which distinguish between the bankrupt and others, see Re Stuyvesant Bank, 6 Ben. 33, Fed. Cas. No. 13,582, citing two other decisions by the same learned judge; Re Comstock, 3 Sawyer, 517, Fed. Cas. No. 3080.

[1] Re Patterson, 1 N. B. R. 150, Fed. Cas. No. 10,819; Re Tanner, 1 Lowell, 215, Fed. Cas. No. 13,745; Peabody *v.* Harmon, 3 Gray, 113.

[2] See Wormsley *v.* Sturt, 22 Beav. 398; Re Lord's Estate, L. R. 2 Eq. 605.

[3] Re Blake, 2 N. B. R. 10, Fed. Cas. No. 1492; Re Trask, 7 Ben. 60, Fed. Cas. No. 14,141; Re Fredenburg, 2 Ben. 133, Fed. Cas. No. 5075; Re Feinberg, 3 Ben. 162, Fed. Cas. No. 4716; Re Fay, 3 N. B. R. 660, Fed. Cas. No. 4708; Re Danforth, 1 Penn. L. J. 148, Fed. Cas. No. 3560; Clement's Case, L. R. 13 Eq. 179, n.; Garrison *v.* Markley, 7 N. B. R. 246, Fed. Cas. No. 5256; Re Pioneer Paper Co., 7 N. B. R. 250, Fed. Cas. No. 11,178. See *infra*, § 470.

[4] Per *Ld. Westbury*, Rolt *v.* White, 3 De G. J. & S. 360.

[5] Thus the residence of the bankrupt, or his wife or father, may be asked by way of giving useful information. Ex parte Vogel, 2 B. & A. 219; Ex parte Campbell, L. R. 5 Ch. 703; Fricker's Case, L. R. 13 Eq. 178. In this case the Vice-Chan-

may directly or indirectly aid the assignees or the creditors in the discovery or settlement of the estate of the bankrupt, or his discharge. If there is probable cause to believe that the inquiry will, or can, lead to valuable information, though indirectly, it is legitimate.[1]

§ 157. **Upon what Subjects.** — The examination of the bankrupt is intended for the information of his assignees and general creditors taking part in the proceedings, and is not governed by the strict technical rules which obtain in ordinary trials. He may, therefore, sometimes be asked as to matters of hearsay, if the subject is material.[2] He is not to be interrogated for the purpose of defeating the proceedings, nor upon immaterial subjects,[3] such as the character of certain debts, as fiduciary, or not, which will not be discharged by his certificate.

§ 158. **In England, Bankrupt must answer Criminating Questions.** — Whether a bankrupt may decline to answer questions that tend to criminate him is a point that has been much discussed. Lord Eldon suggested that the bankrupt was bound to disclose all his property and dealings, though it might incidentally appear that his transactions were illegal; and, again, that he might decline to answer, and yet be liable to imprisonment for not answering.[4] Lord Lyndhurst decided that he might decline to answer questions which had a direct and immediate tendency to criminate him.[5] The text-books state the rule, in the language of Lord Eldon, that he must answer as to his estate and dealings, though he may incidentally criminate

cellor said, "In bankruptcy, a very wide net is thrown to obtain evidence." So, the particulars of a sale of shares by a contributory before the winding up. Clement's Case, L. R. 13 Eq. 179, note. So, examination in aid of proposed action in Parliament. Re Contract Corp., L. R. 6 Ch. 145. See Re Falk, 2 Dea. & Ch. 415; Ex parte Legge, 22 L. J. Q. B. 345. So, inquiry into property in the present possession of the bankrupt or his wife is allowable, in order to exclude its having been acquired or conveyed in fraud of the statute. Re Rosenfield, 1 N. B. R. 319, Fed. Cas. No. 12,059; Re Craig, 3 Ben. 353, Fed. Cas. No. 3322.

[1] See note 5, p. 118.

[2] Re Ottoman Co., 15 W. R. 1060.

[3] Anon., 6 L. T. N. s. 166. [Or to assist a creditor in an action pending against the bankrupt: Re Easton, 8 Morrell, 168; or the trustee in an action against a creditor whom he has summoned for examination: Re Franks, 9 Morrell, 90.]

[4] Ex parte Cossens, Buck, 531.

[5] Ex parte Kirby, Mont. & McA. 212.

himself; but is not bound to answer concerning a criminal act.[1] But I understand the law of England to be that he must answer all questions pertaining to his estate and dealings, though these answers may tend to criminate him directly or indirectly.[2] In the leading case of Regina *v.* Scott,[3] in which evidence obtained from a bankrupt in his examination, under threat of commitment, was admitted against him on the trial of an indictment, Coleridge, J., dissented, not on the ground that the answers were not properly obtained, but that, having been obtained by compulsion, they ought not to be used to his prejudice in a criminal case. This humane and reasonable argument has approved itself to the judgment of some courts in the United States,[4] but is beside our present inquiry.

§ 159. **Constitutional Protection in the United States.** — By the Constitution of the United States, and by that of every State, no person is bound to give evidence against himself in respect to any crime. An act was passed by Congress in 1868 which was probably intended to avoid the constitutional objection to examining bankrupts upon matters which might criminate them. It provides that no discovery or evidence obtained from a party or witness, by means of a judicial proceeding, shall be given in evidence, or in any manner used against him in any court of the United States, in any proceeding of a criminal nature, or for the enforcement of a penalty or forfeiture.[5] Whether this statute affords such a protection to a bankrupt that he must answer criminating questions, is an open question.[6] It does not purport to protect him against proceedings in the State courts; but even as to criminal frauds

[1] Robson, 7th ed., p. 631; Lee, 2d ed., p. 136. See Ex parte Heath, 2 Dea. & Ch. 214; Re Feaks, ib. 226; Re Smith, ib. 230; Ex parte Meymot, 1 Atk. 196; Re Pratt, 1 Glyn & J. 58.

[2] Reg. *v.* Scott, Dears. & B. C. C. 47; Reg. *v.* Cross, ib. 68; Reg. *v.* Skeen, Bell C. C. 97; Reg. *v.* Robinson, L. R. 1 C. C. 80; Reg. *v.* Cherry, 12 Cox C. C. 32; Reg. *v.* Widdop, L. R. 2 C. C. 3; Ex parte Schofield, 6 Ch. D. 230.

[3] Dears. & B. 47.

[4] People *v.* Underwood, 16 Wend. 546; United States *v.* Prescott, 2 Dillon, 405, Fed. Cas. No. 16,085.

[5] 15 Stat. 37; R. S. § 860; Act of 1898, § 7 (9).

[6] Re Bromley, 3 N. B. R. 686; Re Richards, 4 N. B. R. 93, Fed. Cas. No. 11,769; Re Vogel, 5 N. B. R. 393, Fed. Cas. No. 16,984. See Re Patterson, 1 Ben. 508, Fed. Cas. No. 10,815; Re Koch, 1 N. B. R. 549, Fed. Cas. No. 7916. See Ex parte Clarke, 103 Cal. 352.

on the bankrupt law, a statute of this sort cannot fully protect a person from the effect of his disclosures, because, when the criminating fact has been discovered, the means of proving it may often be at hand without any breach of such a statute.

§ 160. **Examination of Attorney.** — The bankrupt's attorney is not bound to disclose his client's communications.[1] It was once ruled by a learned commissioner, that since the privilege of the attorney depends on that of his client, and since a bankrupt is bound to answer fully as to all his estate, dealings, etc., his attorney must disclose the bankrupt's communications.[2] This reasoning is unsound. It is true, in all cases where a party to the action can be interrogated, that he must answer all pertinent questions; but this does not destroy the privilege which is established upon grounds of public policy, that every one's consultations with his attorney are sacred.[3] Indeed, it has never been held that a bankrupt must disclose his communications with his attorney, though he must state the same facts which were the subject of the communications. If the bankrupt consents, the attorney may testify.[4]

§ 161. **Examination, how used in Evidence.** — The examination will be evidence against the deponent himself on questions of title, or to contradict him if called as a witness for others; but he has the right to have the whole examination put in, that his explanations may be considered with his admissions.[5] Irregularity in taking the deposition, or the neglect to sign it, will not, necessarily, in the absence of fraud or oppression, exclude the evidence;[6] nor is the deposition primary evidence, to the exclusion of the recollection of persons who heard his admissions.[7] But, the examination being adverse, a failure of

[1] Flight *v.* Robinson, 8 Beav. 22.

[2] Re Elliott, Fonbl. 74.

[3] See Greenough *v.* Gaskell, 1 Myl. & K. 98.

[4] Merle *v.* Moore, 2 C. & P. 275.

[5] Goss *v.* Quinton, 3 M. & G. 825; Ex parte Ely, 1 M. D. & De G. 357; Ex parte Holdsworth, ib. 475; Ex parte Smith, 2 M. D. & De G. 213; Ex parte Majoribanks, De G. 466; Judd *v.* Gibbs, 3 Gray, 539. A learned judge remarked upon evidence of this kind, that one would be likely to believe all that the witness had said against his own interests, but not what was favorable to him. Per *Alderson, B.*, Russell *v.* Bell, 10 M. & W. 340, 352.

[6] Milward *v.* Forbes, 4 Esp. 172; Yates *v.* Carnsew, 3 C. & P. 99; Knowlton *v.* Moseley, 105 Mass. 136.

[7] Rowland *v.* Ashby, 1 C. & P. 649.

the deponent to mention an incumbrance or other fact not inquired about will not estop him.[1]

§ 162. **Examination as Evidence.** — The statute in England makes the deposition of the bankrupt, or any witness, evidence generally, and not merely as admissions, after the death of the deponent, which seems an anomalous and unreasonable rule.[2] If it is to be evidence, the persons against whom it may possibly be used should be notified of the taking, and be permitted to cross-examine. Independently of statute, an examination is not to be used in evidence excepting against the deponent, or some one who has in fact attended and cross-examined the witness.[3] If, however, the practice is to try a question upon affidavits, an *ex parte* deposition may, perhaps, be used as an affidavit, on due notice.[4]

§ 163. **Commitment for not answering; "Satisfactory" Answers.** — Several successive statutes, in England, required the bankrupt or witness to answer to the "satisfaction" of the commissioners,[5] which was construed to mean that the commissioners were to be satisfied as reasonable men, and subject to the revision of the courts, that the answers were true, and not merely that they were full and explicit.[6] In default of giving such satisfaction, the bankrupt was committed. Thus,

[1] Rolt *v.* White, 3 De G. J. & S. 360.

[2] 32 & 33 Vict., c. 71, § 108. See Reg. *v.* Erdheim, 3 Manson, 142. The act of 1849 (12 & 13 Vict., c. 106, § 242) made the depositions evidence of the petitioning creditor's debt, the trading, and the act of bankruptcy, which was well enough, as those were merel part of the bankruptcy itself. This is provided for, and always has been in this country, by refusing to let the status of bankruptcy be impeached, which is now the law of England, and renders the admission of *ex parte* depositions unnecessary.

[3] Hamond *v.* Myers, 3 Atk. 415; Ex parte Campbell, 2 Rose, 51; Ex parte Coles, Buck, 242; Ex parte Coles, 3 Mad. 315.

[4] Ex parte Chambers, 2 Mont. & A. 440; Ex parte Rees, De G. 205; Ex parte Dobson, 4 Dea. & Ch. 69; Ex parte Prescott, 1 M. D. & De G. 199; Ex parte Thorold, 3 M. D. & De G. 274.

[5] Eden, Bankruptcy, 2d ed., p. 92.

[6] See Rex *v.* Perrot, 2 Burr. 1122, 1215. In that case, after a long imprisonment of the bankrupt, a large sum of money of which he had given an unsatisfactory account was found in the bottom of a chair, and he was executed for the concealment. Per *Ld. Kenyon*, Ex parte Nowlan, 6 T. R. 118; see that case and s. c. (years after), 11 Ves. 511, 2 Rose, 401; Re Jones, 4 Dea. & Ch. 536; Ex parte Bradbury, 14 C. B. 15; Ex parte Lord, 16 M. & W. 462; Ex parte Legge, 22 L. J. Q. B. 345; Ex parte Oliver, 2 Ves. & B. 244; Ex parte Baxter, 7 B. & C. 673.

indirectly, imprisonment for an indefinite period, often for years, was inflicted upon a bankrupt who was supposed to be, and often was, concealing assets;[1] but not by reason of the concealment, for no evidence was admissible from third persons for or against the probability of the truth of the answers.[2] There are but few reported cases in which a mere witness has been imprisoned for not answering truly, though the statutes included witnesses. The English law of 1869 omits the word "satisfactory" or "satisfaction," and our statutes have no such expression. It has been intimated that a bankrupt under our law must answer to the satisfaction of the register; but this is more than doubtful.[3] The court may imprison the bankrupt until he surrenders his property; but the examination is merely evidence for or against concealment, which should be found as a distinct fact upon all the evidence offered, and be made the foundation of an appropriate decree, and not confused with the examination. The rule in England, before the word "satisfaction" was called to the attention of the courts, was, that a full and explicit answer was all that could be required, the bankrupt being subject to whatever penalties the law prescribed, if he answered falsely.[4] And this is the law in the United States.

[1] See note 6, p. 122.

[2] Re Goodwin, Mont. 304. See Crowley's Case, 2 Swanst. 1, where the point is discussed, though not determined.

[3] Re Salkey, 6 Biss. 269, Fed. Cas. No. 12,253; but see s. c., 6 Biss. 280, Fed. Cas. No. 12,254; Re Mooney, 15 N. B. R. 456, Fed. Cas. No. 9748.

[4] Miller's Case, 2 Bl. 881; Pedley's Case, 1 Leach C. C. 365.

CHAPTER VIII.

PROOF OF DEBTS.

§ 164. **Provable Debts.** — Successive statutes in England have continually enlarged the class of debts which may be proved in bankruptcy; but, until 1869, the courts of common law, with great perseverance, narrowed and limited the statutes by construction.

Our courts of common law have been more liberal; and we have always admitted to proof certain classes of debts, such as unliquidated damages, which required special legislation in England. Debt, said a learned judge, in Massachusetts, is a word of large import, which includes, in its popular sense, "all that is due to a man under any form of obligation or promise."[1]

§ 165. **Debts payable in Future.** — Debts absolutely due, but not payable until after the bankruptcy, are made provable by most of the statutes.[2] The earliest of these was passed to meet some doubts, and purports to declare the law, rather than to change it.[3] If any statute should omit to mention such debts, they would, probably, at the present day, be held admissible.[4] Under the latest English statute, a covenant by the debtor that his executors or administrators should pay a certain sum after his death creates a provable debt.[5]

[1] Per Hubbard, J., Gray *v.* Bennett, 3 Met. 522, 526.

[2] Bank *v.* Minge, 49 Minn. 454; Mooney *v.* Detrick, 85 Cal. 549; Hinds *v.* Heath, 38 Atl. Rep. 382 (N. H.); Act of 1898, § 63 a (1). See *infra*, § 526.

[3] 7 Geo. I., c. 31.

[4] See Rule 77 under the English statute of 1869, which neglected to mention such debts, and Eaton *v.* Whitaker, 6 Pick. 465; Wilby *v.* Phinney, 15 Mass. 116; Bacon *v.* Thorp, 27 Conn. 251, 261, per *Ellsworth, J.*; Lansing *v.* Prendergast, 9 Johns. 127, 128. Unpaid subscription to stock held provable. Glenn *v.* Abell, 39 Fed. Rep. 10; Glenn *v.* Howard, 65 Md. 40; Sayre *v.* Glenn, 87 Ala. 631.

[5] Barnett *v.* King, 7 Morrell, 267.

Upon debts of this character, if they do not run with interest, there must be a discount, or rebate, to bring them to a cash valuation as of the day when the proceedings were begun.[1] The English practice is to make the allowance in computing the dividend; but our method is more direct and simple.

§ 166. **Contingent Debts and Liabilities provable if secured by Bond, etc.** — Debts whose amount was not fixed with certainty, because the liability would only become absolute, or would cease upon the happening of a future event, such as annuities for life, shared the fate of all unliquidated claims in England and were rejected. When, however, such a debt or liability was secured by a note, bill, bond, or judgment, which was due before the bankruptcy, the court would lay hold of the legal debt, and, under its cover, permit proof of the value of the true claim, if capable of valuation, not exceeding the amount of the legal debt.[2] This is still the law, and may be useful in some cases to supplement imperfections of the statutes.[3]

This law is administered equitably, and if the real debt be one which is considered incapable of valuation, such as that of a bankrupt surety, when the principal is solvent and has made no default, the legal debt cannot be proved in bankruptcy or only as a claim to be liquidated if the contingency should happen before the estate is settled, unless the contract of the surety binds him to the creditor as a principal.[4]

§ 167. **Contingent Debts and Liabilities continued; Possibility of Valuation.** — When the statutes attempted to admit to

[1] Act of 1898, § 63 a (1), *infra*, § 526.

[2] Ex parte Lecompte, 1 Atk. 251; Ex parte Belton, ib.; Perkins *v.* Kempland, 2 W. Bl. 1106; Wyllie *v.* Wilkes, Doug. 519; Toussaint *v.* Martinnant, 2 T. R. 100; Hodgson *v.* Bell, 7 T. R. 97; Ex parte Thistlewood, 19 Ves. 236, per *Ld. Eldon;* Baxter *v.* Nichols, 4 Taunt. 90; Collins *v.* Lightfoot, 5 B. & C. 581; Ex parte Rowlatt, 2 Rose, 416; Butcher *v.* Churchill, 14 Ves. 567, per *Sir W. Grant;* Ex parte Benecke, 2 Mont. & Ayr. 692.

[3] Clinton *v.* Hart, 1 Johns. 375; Roosevelt *v.* Mark, 6 Johns. Ch. 266; Ex parte Griffiths, De G. 597; Moseley *v.* Ames, 5 Allen, 168.

[4] Ex parte Thompson, 2 Dea. & Ch. 126; Thompson *v.* Thompson, 2 Bing. N. C. 168; Ex parte Marshall, 1 Mont. & Ayr. 118; Johnson *v.* Compton, 4 Sim. 37; Ex parte Marks, 8 Dea. 133; Thompson *v.* Whatley, 16 Q. B. 189; Amott *v.* Holden, 18 Q. B. 593; White *v.* Corbett, 1 E. & E. 692; E. B. & E. 1103; Boyd *v.* Robins, 5 C. B. N. S. 597.

proof contingent demands, the courts for many years persisted in construing them in a very narrow spirit. Thus, when contingent debts were made provable, they took a distinction between a debt and a liability, which, however obvious it may be, is of no consequence, provided the demand becomes absolute before the close of the proceedings, or is capable of valuation. Then, when "liability" was introduced into a later statute, it was in this form, — "liability to pay money upon a contingency;" and the courts held that this did not include a liability for damages, or a liability to pay money which depended upon two or more contingencies. All this learned trifling has been swept away by the law of 1869 in England, and the courts have acquiesced.

In construing our statute of 1841, which admitted all contingent demands, some courts followed the early English precedents.[1] "I am inclined to think," says a learned Chancellor, in referring to these decisions, "the old rule, based upon the words of the earlier statutes of bankruptcy, was allowed too much weight in giving reasons for the decisions under the act of 1841."[2]

Other courts, taking the broad words of the statute in their largest sense, held that all liabilities were discharged, whether there had been a breach or not, and although it was impossible to put any approximate value upon the liability.[3]

Still others adopted the test, which is now generally considered the true one, of the possibility of estimation or valuation; and this has been ratified by the Supreme Court.[4] And this may be considered the test under all similar statutes. There is yet, however, a considerable difference of opinion as to the possibility of valuing any given contingency. This difficulty is met in the English statutes of 1869 and 1883 by giving the

[1] Swain *v.* Barber, 29 Vt. 292; Dunn *v.* Sparks, 1 Ind. 397; Dole *v.* Warren, 32 Me. 94.

[2] Eberhardt *v.* Wood, 2 Tenn. Ch. 488, 495, per *Cooper, C.*

[3] Shelton *v.* Pease, 10 Mo. 473; Jemison *v.* Blowers, 5 Barb. 686; Bates *v.* West, 19 Ill. 134.

[4] Riggin *v.* Magwire, 15 Wall. 549; Mace *v.* Wells, 7 How. 272. See Taylor *v.* Young, 3 B. & A. 521; Harding *v.* Smith, 11 Pick. 478; Woodard *v.* Herbert, 24 Me. 353.

court of bankruptcy the power to declare any such liability to be incapable of valuation. In the absence of such a decision the liability is presumed to have been provable.[1]

§ 168. **Bankrupt Drawer or Indorser.** — A very common case of a contingent debt deserves a moment's notice, by reason of certain decisions which have sometimes been misunderstood. Some of the English statutes declared that any one who had given credit to another upon a bill, note, or bond might prove against his estate. This was construed to permit proof against a drawer or indorser, even before the bill became due.[2] But it must be understood that this did not necessarily mean that the creditor was to receive a dividend. It would be the duty of the assignees to have the proof expunged if the bill was paid at maturity by the person primarily liable; and, in the meantime, the dividend would be enjoined.[3]

By our practice, a creditor may make a "claim," in order to notify the assignees that he expects to have a debt; but he cannot make full proof against a drawer or indorser until the bill has been dishonored.[4] The difference is only material in this that the contingent debt would not, with us, be a good petitioning creditor's debt.

§ 169. **Future Rent.** — Rent to accrue in future, under a lease which is still operative, if called a debt, is one depending on contingencies which cannot be valued; and no statute admitting proof of contingent debts or liabilities has ever been construed to include it without a special provision to that effect.[5]

The existing English law makes the bankruptcy a surrender on the lessees' part, and requires the assignees to claim or dis-

[1] Hardy *v.* Fothergill, 13 App. Cas. 351. As to contingent debts under the act of 1898, see *infra*, § 526.

[2] Starey *v.* Barns, 7 East, 435; Ex parte Douthat, 4 B. & A. 67.

[3] Sarratt *v.* Austin, 4 Taunt. 200.

[4] Stowell *v.* Richardson, 3 Allen, 64.

[5] Bosler *v.* Kuhn, 8 Watts & S. 183; Savory *v.* Stocking, 4 Cush. 607; Treadwell *v.* Marden, 123 Mass. 390; Deane *v.* Caldwell, 127 Mass. 242; Re Commercial Bulletin Co., 2 Woods, 220, Fed. Cas. No. 3060; In re Bell, 85 Cal. 119; In re Hevenor, 70 Hun, 56; Re Shotwell, 49 Minn. 170; Rodick *v.* Bunker, 84 Me. 441; Weinmann's Estate, 164 Pa. St. 405. [There is no provision in the act of 1898 for the proof of rent.]

claim the lease. If they disclaim, the damages may be estimated with sufficient certainty for the purposes of proof, by comparing the present rentable value of the estate with the agreed rent.[1]

It has been suggested that without the aid of a statute a form of lease might be made by which the term should be ended by the bankruptcy of the lessee, and the lessee's estate should be liable for damages.[2] But a stipulation that the lessee shall remain liable on his covenants, and be credited with what the lessor may receive, will not have this effect.[3]

It has been said that the covenants of a lessee who has parted with his lease before his bankruptcy to a person who remains solvent, do not give rise to a provable debt, because there are no means of valuing the chances of his assignee becoming insolvent, and the consequences which might follow.[4]

§ 170. **If Contingency happens before Close of Bankruptcy, the Debt may be proved.** — If a contingent liability of the bankrupt becomes an absolute debt before the estate is finally closed, it may be proved. What the contingency was, or how entirely impossible it might have been to value it beforehand, or how late in the settlement of the estate it becomes absolute, are immaterial, if it does become so while there are assets to divide. When that time arrives, though it should be forty years or more after the beginning of the proceedings, it will not be too late to make proof and share in future dividends.[5]

§ 171. **Contingent Liability; What Liabilities can be valued.** — If the creditor fears that the contingency will not happen before the estate is closed, he may apply to prove for the esti-

[1] Ex parte Llynvi Coal Co., L. R. 7 Ch. 28; Ex parte Blake, 11 Ch. D. 572.

[2] See Ex parte Houghton, 1 Lowell, 554, Fed. Cas. No. 6725; Ex parte Llynvi Coal Co., L. R. 7 Ch. 28.

[3] Ex parte Lake, 2 Lowell, 544, Fed. Cas. No. 7991; Bowditch v. Raymond, 146 Mass. 109.

[4] Ex parte Waters, L. R. 8 Ch. 562, 568, per *Mellish, L. J.*; but see Hardy v. Fothergill, 13 App. Cas. 351.

[5] Ex parte Grundy, Mont. & McA. 293; Ex parte Barwis, 6 D. M. & G. 762; Ex parte Boddam, 2 D. F. & J. 625; Adkins v. Farrington, 5 H. & N. 586; Ex parte Elmes, 33 L. J. Bky. 23; Ex parte Simpson, 3 Dea. & Ch. 792, 811, per *Erskine, C. J.*; Suppiger v. Gruaz, 137 Ill. 216; Locheimer v. Stewart, 91 Tenn. 385; Hussey v. Crawford, 152 Mass. 596. [Under the act of 1898 claims must be proved within a year after adjudication. § 57 n. See *infra*, § 520.]

mated present value of the debt, and then the question is, whether it is capable of valuation; if it is, it will be discharged, and, therefore, he should offer it if in any doubt. Opinions may differ upon the possibility of such a valuation, and the statute of 1869 in England makes the court of bankruptcy the final judge of the question. The following cases have passed into judgment: —

Covenants and undertakings concerning a future event which may never happen, such as a covenant of warranty, or for quiet enjoyment in a conveyance of land, create no debt until an eviction;[1] but a covenant of seisin, or against existing incumbrances, if broken at all, is broken at the time it is made and the damages are provable,[2] and so a warranty of quality in the sale of a chattel.[3]

A liability to calls or assessments upon shares in a corporation or limited company, which will not be due unless the company becomes insolvent, is not a provable debt unless the insolvency occurs before the proceedings in bankruptcy are closed;[4] but if that event has happened before the bankruptcy, or before it is too late for creditors to prove, the calls may be proved, and will be discharged.[5]

There is another class of private corporations in the United States, in which, by statute, the members are jointly and severally liable for the debts, if certain rules have not been observed. This liability has been construed by the courts not to be, in truth, a several liability in the full sense, but one which could be worked out only by a bill in equity for the

[1] Bennett *v.* Bartlett, 6 Cush. 224; French *v.* Morse, 2 Gray, 111; Bush *v.* Cooper, 26 Miss. 599; Riggin *v.* Magwire, 15 Wall. 549, affirming s. c. 44 Mo. 512.

[2] Williams *v.* Harkins, 15 N. B. R. 84; Parker *v.* Bradford, 45 Iowa, 311.

[3] Merrill *v.* Schwartz, 68 Me. 514.

[4] Re Moor, 1 De G. J. & S. 330; Betteley *v.* Stainsby, L. R. 2 C. P. 568; Financial Corp. *v.* Lawrence, L. R. 4 C. P. 731; Martin's P. A. Co. *v.* Morton, L. R. 3 Q. B. 306; Hastie's Case, L. R. 7 Eq. 3; L. R. 4 Ch. 274; Kellock *v.* Enthoven, L. R. 8 Q. B. 458; L. R. 9 Q. B. 241; Furdoonjee's Case, 3 Ch. D. 264.

[5] See Ex parte Nicholas, 2 De G. M. & G. 271; Chapple's Case, 5 De G. & Sm. 400; Greenshield's Case, ib. 599; Parbury's Case, 3 De G. F. & J. 80; Ex parte King, L. R. 3 Ch. 10; Ex parte Pickering, L. R. 4 Ch. 58; Ex parte Marshall, L. R. 7 Ch. 324; Mitchell's Case, L. R. 5 Ch. 400; Irons *v.* Manuf. Bank, 17 Fed. Rep. 308, 27 Fed. Rep. 591.

whole body of creditors against the whole body of shareholders, to ascertain and adjust all the debts and all the contributions. It follows logically, and has been decided, that the debts of such a company cannot be proved against the assets of a bankrupt shareholder until his share has been thus liquidated.[1]

If the bankrupt is a surety for future payments by a principal who remains solvent, or for the faithful performance of duty before a default, the courts have been unable to estimate the value of his possible future insolvency, and such debts are usually excluded.[2] But if the principal is in default before the bankruptcy of the surety, the debt may be proved. There are cases, however, which hold that if the breach is unknown to a diligent creditor, he had no such provable debt against the estate of the surety as would be barred by the discharge.[3]

It has been held that recurring payments which are to be made or to cease upon the happening of a contingency which is likely to happen, but at a wholly uncertain time or times, cannot be valued.[4] But an existing debt of this sort will be estimated at its full present value, if the contingency upon which the payments are to cease is very improbable, or involves the doing of something which is unlawful, such as the marrying a deceased wife's sister, or a wife's separating from her husband, or an apparently good title being defeated, etc.[5] Indeed, it has been laid down as a general rule that the chance that a person will break his covenant, or will fail to do what he ought to do, is not to be taken into account, either to prevent a valuation

[1] Kelton *v.* Phillips, 8 Met. 61; Bangs *v.* Lincoln, 10 Gray, 600; James *v.* Atlantic Works, 11 N. B. R. 390, Fed. Cas. No. 7179. See Davison *v.* Farmer, 6 Ex. 242.

[2] Ex parte Thompson, 2 Dea. & Ch. 126; Thompson *v.* Thompson, 2 Bing. N. C. 168; Ex parte Marks, 3 Dea. 133; Amott *v.* Holden, 18 Q. B. 593; White *v.* Corbett, 1 E. & E. 692; E. B. & E. 1103; Boyd *v.* Robins, 5 C. B. N. S. 597; Loring *v.* Kendall, 1 Gray, 305; Ex parte Waters, L. R. 8 Ch. 562, 568, per *Mellish, L. J.*; Paddleford *v.* State, 57 Miss. 118. Even in this case the debt is provable by the surety under the latest English statute. Re Herepath, 7 Morrell, 129.

[3] See Ellis *v.* Ham, 28 Me. 385; Eberhard *v.* Wood, 2 Tenn. Ch. 488.

[4] Parker *v.* Ince, 4 H. & N. 52; Ex parte Evans, 3 De G. & Sm. 561; Mudge *v.* Rowan, L. R. 3 Ex. 85; Brett *v.* Jackson, L. R. 4 C. P. 259.

[5] Ex parte Davis, Mont. 297; Ex parte Naden, L. R. 9 Ch. 670; Ex parte Waters, L. R. 8 Ch. 562. See Re Allen, 10 Morrell, 84.

or to diminish its amount.[1] Liabilities which involve either the payment, or the ceasing to pay, at the end of a life or any number of lives in being, can always be valued by the tables of actuaries.[2]

Under the very broad statute in England, above cited, it has been held that the chance of a widow's marrying again is not incapable of liquidation.[3] "No doubt it is uncertain whether the appellant will marry again, just as the duration of any particular life is uncertain. But, though the duration of a particular life is uncertain, the expectation of life at a given age is reduced to a certainty when you have regard to a million lives. The value of the expectation of life is arrived at by an average deduced from practical experience. The intention of the act was to get rid of the difficulties which had arisen in former cases, in which very great hardship had been inflicted both upon creditors who were deprived of any share of the bankrupt's assets, and upon the bankrupt who remained liable to the creditor's claims."[4]

A covenant by the assignee of a lease to indemnify his assignor against his covenant to repair is capable of valuation.[5]

§ 172. **Alimony.** — Alimony cannot be proved, because it is not a debt, but represents a continuing obligation of the husband. If considered a debt, it would be incapable of valuation, because it is subject to change from time to time by order of the court.[6]

§ 173. **Surety; Proof by Surety when Principal is Bankrupt.** — The contingent liability of a principal to indemnify his surety not being a debt due to the surety until he has paid the creditor could not, under the earliest statutes, be proved by

[1] Staines *v.* Planck, 8 T. R. 386, 389, per *Ld. Kenyon*. See Walcott *v.* Hall, 2 Bro. C. C. 305; Ex parte Jackson, 27 L. T. N. S. 696.

[2] Ex parte Granger, 10 Ves. 348; Ex parte Tindal, 1 Dea. & Ch. 291; Re Tindal, 8 Bing. 402; Ex parte Sitger, Mont. 100; Ex parte Annandale, 2 Mont. & A. 19; Ex parte Parratt, 2 Mont. & A. 626; Ex parte Broadley, 2 M. D. & De G. 524; Ex parte Naden, L. R. 9 Ch. 670.

[3] Ex parte Blakemore, 5 Ch. D. 372.

[4] Ib. 374, per *James, L. J.*

[5] Hardy *v.* Fothergill, 13 App. Cas. 351.

[6] Linton *v.* Linton, 15 Q. B. D. 239; Re Hawkins (1894), 1 Q. B. 25; Ex parte Fryer, 17 Q. B. D. 718; Bailey *v.* Bailey, 13 Q. B. D. 855; Kerr *v.* Kerr (1897), 2 Q. B. 439.

the surety, if he paid it after the beginning of the proceedings against his bankrupt principal. He might, by a bill in equity after or accompanied by payment, require the creditor to prove, or be subrogated to his proof;[1] and, if he paid the debt, he could recover from the creditor any dividends afterwards received by him.[2] These remedies were difficult for the surety, and his right of election was unjust to the debtor. In 1809 a statute was passed which has been followed generally in later statutes in England and this country,[3] by which any person liable as bail, surety, guarantor, or otherwise, for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, may prove, or stand in the place of the creditor if he has proved. Our late statute added, in conformity with the practice before existing, that any person so liable, who has not paid, may prove in the name of the creditor or otherwise, as may be provided by the general orders, if the creditor fails to prove.[4] The purpose is to enable the surety to obtain the advantage of the dividend, though the debt is not yet payable.

We have the authority of Lord Eldon that the words "persons liable" were introduced into the statute "for the convenient latitude of comprehending all those who could not be strictly considered as sureties, and yet might meet the protection they were entitled to under those general words."[5]

In Massachusetts the statute concerning living insolvents, which permits sureties to prove, is held not to include a retired partner,[6] — a somewhat narrow decision. Even in that State, however, partners may prove against the assets of a deceased insolvent partner, subject to the priority of joint creditors.[7]

[1] Ex parte Atkinson, Cooke, 7th ed., 210; Beardmore *v.* Cruttenden, ib. 221; Wright *v.* Simpson, 6 Ves. 714; Ex parte Rushforth, 10 Ves. 409; Wright *v.* Morley, 11 Ves. 12; Re Babcock, 3 Story, 393, Fed. Cas. No. 696.

[2] Selfridge *v.* Gill, 4 Mass. 95.

[3] 49 Geo. III., c. 121, § 8. This act omitted to mention bail, who were added by a late statute, and are specially mentioned in most modern laws. See act of 1898, § 57 i, *infra*, § 520.

[4] Act of 1867, § 19; 14 Stat. 525; R. S. § 5070; Act of 1898, § 57 i. [In England a surety can prove before paying: Re Herepath, 7 Morrell, 129; but cannot vote for trustees: Re Parrott, 8 Morrell, 49.]

[5] Ex parte Young, 2 Rose, 40, 46; Ex parte Lobbon, 17 Ves. 334.

[6] Morton *v.* Richards, 13 Gray, 15, though a retired partner has the rights of a surety; Oakeley *v.* Pasheller, 4 Cl. & F. 207.

[7] Wilby *v.* Phinney, 15 Mass. 116; Johnson *v.* Ames, 11 Pick. 173.

"Persons liable" includes solvent partners who have paid more than their share of just debts, or who have retired with an undertaking by the remaining partners to pay the debts;[1] and so of drawers, indorsers, or any other parties to commercial paper, who are, as between themselves and the bankrupt, entitled to be indemnified by him, whatever may be their situation on the paper;[2] and, of course, the executor or assignee of a dead or bankrupt surety succeeds to his rights.[3]

The surety, or person liable, must usually pay or satisfy the debt before he can prove in his own right, or be subrogated to that of the creditor; mere indemnity, or offer of indemnity, is not enough; but any arrangement which the creditor accepts in full exoneration of the bankrupt will do;[4] and the court has power to accept indemnity, if the surety is prevented from paying the debt by obstacles beyond his control.[5] Payment by the surety in discharge merely of his own liability gives him no right of proof.[6] If the surety does not choose to pay the debt, he cannot object to the creditors signing an assent to the bankrupt's discharge. If he does pay it, he is subrogated to all rights of the creditor under the proceedings.[7] If the

[1] Ex parte Taylor, 2 Rose, 175; Ex parte Watson, 4 Madd. 477; Wood v. Dodgson, 2 M. & S. 195; Ex parte Carpenter, Mont. & McA. 1; Aflalo v. Fourdrinier, 6 Bing. 306; Ex parte Ogilby, 3 Ves. & B. 133; Butcher v. Forman, 6 Hill, 583; Crafts v. Mott, 5 Barb. 305, and 4 N. Y. 603; Fisher v. Tifft, 12 R. I. 56. This last decision is criticised by an able writer, 18 Am. Law Reg. N. S. 9, but is entirely sound. Fisher v. Tifft, 127 Mass. 313; Fernald v. Clark, 84 Me. 234.

[2] Stedman v. Martinnant, 13 East, 427; Bassett v. Dodgin, 9 Bing. 653; Haigh v. Jackson, 3 M. & W. 598; Mace v. Wells, 7 How. 272; Hunt v. Taylor, 108 Mass. 508; Fulwood v. Bushfield, 14 Penn. St. 90; Hardy v. Carter, 8 Humph. 153; Van Sandau v. Corsbie, 8 Taunt. 550; Filbey v. Lawford, 3 M. & G. 468, explaining a *dictum* in Yallop v. Ebers, 1 B. & Ad. 698; Liebke v. Thomas, 116 U. S. 605.

[3] Ex parte Johnson, 3 De G. M. & G. 218.

[4] Ex parte Moore, 2 Gl. & J. 166; Ex parte Allen, 3 De G. & J. 447; Fox v. Eckstein, 4 N. B. R. 373, Fed. Cas. No. 5009; Abbott v. Bruere, 5 Bing. N. C. 598; Re Morrill, 8 N. B. R. 117, Fed. Cas. No. 9821.

[5] Ex parte Webster, De G. 414.

[6] Soutten v. Soutten, 5 B. & Ald. 852. This case was wrongly decided, but the point now in question was rightly stated. See *infra*, § 446.

[7] Browne v. Carr, 7 Bing. 508, and 2 Russ. 600; Ratcliffe v. Gunson, 6 Madd. 193; Ex parte Herbert, 2 Gl. & J. 66; Ex parte Taylor, 1 Gl. & J. 399; Cooper v. Jenkins, 32 Beav. 337; Sigourney v. Williams, 1 Gray, 623; Guild v. Butler, 122 Mass. 498.

time for proof is limited by the statute, it is no excuse for the surety who does not apply within the time that he was contesting his liability to the creditor.[1]

§ 174. **Proof by Co-promisors and Co-sureties.** — Two classes of decisions were made under former statutes in England which appear unsound under the existing statutes. They were cases in which the supposed debt accrued after the beginning and before the close of the bankruptcy: —

1. That one of two joint and several promisors paying the whole debt could not prove against the estate of his bankrupt co-promisor.[2]

2. That co-sureties cannot prove against each other.[3]

But a co-promisor or a co-surety seems to be "a person liable," not only to the creditor for the whole debt, but to his fellow promisor or surety, for a share which the latter has paid beyond his proportion. Such is the better opinion in this country, and there is authority for it in England.[4]

Privity of contract is not always essential. An agent or broker who, in the course of business, has made himself personally liable for his principal, though without his knowledge or request, and has paid the debt since the bankruptcy of the principal, has been permitted to prove "as a person liable" for him.[5]

That when a co-surety had become liable to pay the debt before the bankruptcy of his fellow surety, his demand would be provable, though he paid afterwards, was held by a learned Chancellor, in an opinion of great ability: Eberhardt *v.* Wood.[6]

And, by the existing law in England, it would be provable if

[1] French *v.* Hayward, 16 Gray, 512; Sears *v.* Wills, 7 Allen, 430.

[2] Ex parte Porter, 4 Dea. & Ch. 774, well criticised in Griffith & Holmes on the Bankrupt Law, Vol. I., p. 564.

[3] Clements *v.* Langley, 5 B. & Ad. 372; Wallis *v.* Swinburne, 1 Ex. 203. See Swain *v.* Barber, 29 Vt 292; Goss *v.* Gibson, 8 Humph. 197; Dole *v.* Warren, 32 Me. 94.

[4] See Judge Hare's note to Mills *v.* Auriol, 2 Smith L. C. (7th Am. ed.) 1236; Tobias *v.* Rogers, 13 N. Y. 59; Dean *v.* Speakman, 7 Blackf. 317; Clarke *v.* Porter, 25 Penn. St. 141; Ex parte Hunter, Buck, 552; Ex parte Moore, 2 Gl. & J. 166; Ex parte Plowden, 2 Dea. 456; Miller *v.* Gillespie, 59 Mo. 220.

[5] Ex parte Robinson, Buck, 113; Ex parte Hustler, ib. 171; Re Schenk, 33 L. T. 246.

[6] 2 Tenn. Ch. 488.

the contingency happened before the close of the proceedings, or if the court found it capable of liquidation, which it would be if the debt had become payable and was not paid.

If the debt of the principal is not payable before the close of the bankruptcy, and he remains solvent, the weight of authority still is that the liability of a surety to the creditor, and, by consequence, that of a co-surety to his fellows, would not be capable of liquidation.

Chancellor Cooper, in the case last cited,[1] is inclined to admit that if the suretyship is for the faithful performance of the duties of an office, and the default is unknown while the surety is bankrupt, the debt is not one which can be considered certain enough to be provable; differing from a money debt, the maturing of which is known to the surety.

§ 175. **Subrogation when Surety and Principal are both Bankrupt.** — After the creditor proving against both estates is fully paid, the assignee of the surety or other "person liable" will be subrogated to the creditor's proof against the estate of the principal, and will share future dividends equally with other creditors, until he has received all that he has paid in dividends on that debt, or, in other words, until the creditors of the surety are indemnified;[2] and this extends to the assignees of co-sureties whose estates have paid more than their proportion, and to those of co-partners after the joint debts have been fully paid.[3] It has been decided that a surety paying the debt may hold the full proof which the creditor has made against the estate of his co-surety;[3] but in Massachusetts the rule is otherwise.[4]

§ 176. **Proof of Bills and Notes.** — The bankruptcy of the acceptor of a bill or maker of a note will not excuse presentment to him, and notice to the drawer and indorsers; nor will

[1] Eberhardt *v.* Wood, 2 Tenn. Ch. 488.

[2] Ex parte Marshal, 1 Atk. 129; Ex parte Stokes, De G. 618; Ex parte Johnson, 3 De G. M. & G. 218; Re Parker (1894), 3 Ch. 400.

[3] Lidderdale *v.* Robinson, 2 Brock. 159, Fed. Cas. No. 8337; 12 Wheat. 594; Hess' Estate, 69 Pa. St. 272; Ex parte Stokes, De G. 618.

[4] New Bedford Inst. *v.* Hathaway, 134 Mass. 69.

the bankruptcy of the drawer or indorser excuse notice to him or his assignee.[1]

If the person entitled to notice is bankrupt, he is still the proper person to be notified, unless his assignees have been appointed;[2] and by a recent decision even afterwards,[3] though a notice to his assignees would, undoubtedly, be equally valid. If a firm, and one or more of the partners, are severally parties to the paper, and all are jointly bankrupt, no notice is necessary, because the assignees represent them all;[4] and if the late case above cited is sound,[3] it would be immaterial whether they have the same assignee or not, because no notice to the bankrupts themselves would be necessary if they were not bankrupt.[5] When a bankrupt is entitled to notice, he has power to waive it.[6]

It seems, too, that holders of notes and bills, or other debts, will discharge the estate of the surety in bankruptcy by giving time to the principal without the consent of the bankrupt or of his assignees.

§ 177. **Proof of Judgments and Awards.** — Judgments and final awards for money, entered or published before the bankruptcy, are provable, though the cause of action was a tort or a demand not provable;[7] and so of a completed judgment for

[1] Russel *v.* Langstaffe, Doug. 514; Ex parte Wilson, 11 Ves. 410; Ex parte Rhode, Mont. & McA. 430, and Rhode *v.* Proctor, 4 B. & C. 517; Ex parte Johnston, 3 Dea. & Ch. 433; Ex parte Bignold, 1 Dea. 712; Lawrence *v.* Langley, 14 N. H. 70.

[2] Ex parte Moline, 19 Ves. 216; Ex parte Johnson, 3 Dea. & Ch. 433; Re Loder, 4 N. B. R. 190, Fed. Cas. No. 8457; Ex parte Tremont Bank, 2 Lowell, 409, Fed. Cas. No. 14,169.

[3] Ex parte Baker, 4 Ch. D. 795.

[4] Fuller *v.* Hooper, 3 Gray, 334; Ex parte Russell, 16 N. B. R. 476, Fed. Cas. No. 12,148.

[5] Porthouse *v.* Parker, 1 Camp. 82; Rhett *v.* Poe, 2 How. 457.

[6] Brett *v.* Levett, 13 East, 212; Ex parte Tremont Bank, 2 Lowell, 409, Fed. Cas. No. 14,169.

[7] Act of 1898, § 63 (1), *infra*, § 525; Packer *v.* Whittier, 81 Fed. Rep. 335; Ex parte Lingood, 1 Atk. 240; Baker's Case, 2 Str. 1152; Ex parte Hill, 11 Ves. 646; Robinson *v.* Vale, 2 B. & C. 762; Greenway *v.* Fisher, 7 B. & C. 436; Ex parte Harding, 5 De G. M. & G. 367; Re Comstock, 5 Law Reporter, 163, Fed. Cas. No. 3078, and 22 Vt. 642; Comstock *v.* Grout, 17 Vt. 512; Ex parte Thayer, 4 Cow. 66; Hayden *v.* Palmer, 24 Wend. 364; Re Book, 3 McLean, 317, Fed. Cas. No. 1637; Re Hennocksburgh, 7 N. B. R. 37, Fed. Cas. No. 6367; Re Wiggers, 2 Biss. 71, Fed. Cas. No. 17,623; Manning *v.* Keyes, 9 R. I. 224; Howland *v.* Carson, 16 N. B. R. 372; Hays *v.* Ford, 55 Ind. 52.

costs in an action or an indictment, if payable to a private prosecutor.[1] But a verdict, or an award that is not complete and final, will not convert a non-provable demand into a provable debt.[2] If an action is pending at the time of the bankruptcy upon a provable debt, the court of bankruptcy may permit it to proceed to judgment to ascertain the amount for which proof is to be made.[3] No doubt the court in which the action is pending may make the order, if the court of bankruptcy does not intervene. In either case, the assignees should be made parties defendant, because they represent the opposition to a proof; the record should contain a statement of the purpose for which the judgment is entered;[4] and execution is to be stayed until the question of the debtor's discharge is determined.[4] In such a case, the action being authorized costs as well as debt can be proved.[5]

§ 178. **Unliquidated Damages.** — In the United States, unliquidated damages, arising *ex contractu* and recoverable at law, have always been provable as debts without special mention in the statute.[6] Some of our acts, following that of Massachusetts,[7] have added to this class of debts damages arising from the conversion of goods and chattels.[8] This was done to save the injustice and anomaly of leaving it optional with the creditor to prove the value of his goods, waiving the tort, or to hold over against the discharged bankrupt an action of trover, and because the conversion might be presumed to have increased the assets.

[1] Reg. *v.* Hills, 2 E. & B. 176; Reg. *v.* Thornton, 4 Ex. 820; Gulliver *v.* Drinkwater, 2 T. R. 261; Holding *v.* Impey, 1 Bing. 189.

[2] Ex parte Charles, 16 Ves. 256, and 14 East, 197; Buss *v.* Gilbert, 2 M. & S. 70; Ex parte Todd, 6 De G. M. & G. 744; Haswell *v.* Thorogood, 7 B. & C. 705; Hodges *v.* Chace, 2 Wend. 248; Crouch *v.* Gridley, 6 Hill, 250; Kellogg *v.* Schuyler, 2 Denio, 73; Zimmer *v.* Schleehauf, 115 Mass. 52; Black *v.* McClelland, 12 N. B. R. 481, Fed. Cas. No. 1462.

[3] See Cothren's Appeal, 59 Conn. 545.

[4] Norton *v.* Switzer, 93 U. S. 355.

[5] Healy *v.* Root, 11 Pick. 389; Mathewson *v.* Sheldon, 6 R. I. 223.

[6] Lothrop *v.* Reed, 13 Allen, 294; Chandler *v.* Windship, 6 Mass. 310; Fowles *v.* Treadwell, 24 Maine, 377; Barker *v.* Mann, 4 Met. 302; Campbell *v.* Perkins, 8 N. Y. 430; McMullin *v.* Bank of Penn Township, 2 Penn. St. 343; Sweatman's App., 150 Penn. St. 369; Parker *v.* Hull, 46 Ill. App. 471.

[7] St. of 1838, c. 163, § 3.

[8] Act of 1867, § 14; 14 Stat. 522; R. S. § 5067. There is no such provision in the act of 1898.

In England, the courts of bankruptcy formerly had only equitable powers, and could not summon in a jury to assess damages; and for this reason, and because it was thought that the letter of the law required the creditor to swear to a precise sum, unliquidated damages, suable at law, were held not to be debts.[1] Later statutes, and especially that of 1869, have made all unliquidated damages provable, unless they arise out of tort.[1]

§ 179. **Equitable Liabilities may be proved.** — It was said by the Master of the Rolls, in 1723, that equitable debts could always be proved in bankruptcy. Jeffs *v.* Wood, 2 P. Wms. 128. Other eminent judges, down to the present time, have made similar observations. "It is a great mistake to suppose that a debt's being provable, depends on whether it is a legal debt. It depends on whether it is a debt in law or in equity." Per Lord Redesdale, Re Murphy, 1 Sch. & Lef. 44, 48. "A commission in bankruptcy is nothing more than a substitution of the authority of the Lord Chancellor, enabling him to work out the payment of those creditors, who could by legal action, or equitable suit, have compelled payment." Per Lord Eldon, Ex parte Dewdney, 15 Ves. 479, 498. "It being the established rule in bankruptcy that every debt which a person could, either in his own name or in the name of any other person, recover at law, or in equity, was a provable debt." Per Sir Wm. James, Ex parte Adamson, 8 Ch. D. 807, 820. Many of the cases which I shall have occasion to cite deal with this class of debts. What are here called equitable debts are often liabilities for a fraud or breach of trust, and all such are included in this term.[2] The law was so under the several bankrupt acts of the United States and in winding-up proceedings in equity.

[1] Lee & Chapman's Case, 30 Ch. D. 216.

[2] Jeffs *v.* Wood, 2 P. Wms. 128; Re Murphy, 1 Sch. & Lef. 44; Ex parte Dewdney, 15 Ves. 479; Terrell *v.* Hutton, 4 H. L. 1091; Ex parte Roffey, 19 Ves. 468; Ex parte Stephens, 14 Ves. 24; Ex parte Young, 2 Rose, 40; Ex parte Taylor, ib. 175; Walcott *v.* Hall, 2 Bro. C. C. 305; Brown *v.* Slater, 16 Conn. 192; Collins *v.* Tillou, 26 Conn. 368; Re Bigelow, 2 N. B. R. 556, Fed. Cas. No. 1398; Re Blandin, 1 Lowell, 543, Fed. Cas. No. 1527; Re Jones, 6 Biss. 68, Fed. Cas. No. 7444; Roosevelt *v.* Mark, 6 Johns. Ch. 266; Ex parte Unity Bank, 3 De G. & J. 63; Ex parte Adamson, 8 Ch. D. 807 and cases. As to equitable debts under the act of 1898 see *infra*, § 526.

§ 180. **Equitable Liabilities in Rhode Island, Massachusetts, and Maine.** — In Rhode Island, Massachusetts, and Maine equitable powers have been but lately conferred upon the courts, and have been somewhat reluctantly accepted; and the courts hold that means have not been provided by the statutes of those States for ascertaining equitable debts, and they, therefore, reject them, even as against the estates of deceased persons.[1]

In these decisions the courts are too self-denying; because no special tribunal, like a jury, is necessary for assessment in equity, and the commissioner or judge in bankruptcy exercises many equitable powers, and needs no others for this purpose.[2]

These decisions are harsh and unjust, because, if a trader who is a trustee becomes bankrupt, or dies insolvent, his trade creditors, who knew the risks they were running, take all the assets, to the exclusion of the persons who have become creditors against their will.

§ 181. **Equitable Debt from Husband to Wife.** — Among the equitable debts provable against a bankrupt are moneys lent him by his wife or her trustees, out of her separate estate, or the value of such estate, which he has agreed to settle on her, or has deprived her of, with or without her consent. If the law permits her to act alone, she may prove; if not, proof may be made by her trustee; or, if her husband is the trustee, by her next friend.[3]

Where the wife has pledged her separate estate for her husband's debt, she has the right to have his property, if any is included in the security first appropriated, as far as it will go. And, no doubt, she has the right, like other sureties,

[1] Hunt *v.* Danforth, 2 Curtis C. C. 592, Fed. Cas. No. 6887; Moies *v.* Sprague, 9 R. I. 541; Robb *v.* Mudge, 14 Gray, 534; Deane *v.* Caldwell, 127 Mass. 242.

[2] See Ex parte Gardner, 11 Ves. 40; Ex parte May, Mont. & Ch. 18; Ex parte Montefiore, 1 De G. 171; Ex parte Westcott, L. R. 9 Ch. 626; Ex parte Green, 2 Dea. & Ch. 113.

[3] Ex parte Thring, Mont. & Ch. 75; Ex parte Wells, 2 M. D. & De G. 504; Re Bigelow, 2 N. B. R. 371, Fed. Cas. No. 1397; Re Blandin, 1 Lowell, 543, Fed. Cas. No. 1527; Re Jones, 9 N. B. R. 556, Fed. Cas. No. 7444; Ex parte Melbourn, L. R. 6 Ch. 64; Fleitas *v.* Richardson, 147 U. S. 550. See *infra*, § 526.

to have the benefit of the creditor's proof, if she or her property shall have satisfied the debt. This point was left open in one of the cases cited below, but is clear on principle.[1] By a recent statute in England, money lent by a wife to her husband for use in his trade is subject to its risks, and in case of bankruptcy the debt is postponed until the claims of other creditors have been satisfied.[2] In Massachusetts, notwithstanding the recent statutes, a debt between husband and wife, being void at law, creates no equitable liability.[3]

The courts will carefully scrutinize transactions of this sort to see that a gift by the wife is not turned into a loan by an after-thought. And it is a very strong presumption of fact that the wife's income, which the husband has been permitted to use, was a gift.[4] But the presumption may be rebutted by proof of a promise to repay the money or other sufficient cause.[5]

If the terms of the settlement are that the husband shall enjoy the income of his wife's property for his life, then, after proof of a debt, due from the husband to the capital of the trust, the practice is to invest the dividends as capital, and pay the income to the assignees during his life. If, however, the debt arose by a default on the part of the husband, the trustees of the settlement would have a lien upon the income, and might accumulate it until the principal of the fund was made good, before making any payments to the assignees.[6]

A partner or his assignees may prove against his co-part-

[1] Aguilar *v.* Aguilar, 5 Madd. 414; Ex parte Hadderley, 2 M. D. & De G. 487; Gleaves *v.* Paine, 1 De G. J. & S. 86; Savage *v.* Winchester, 15 Gray, 453; Gahn *v.* Neimcewicz, 3 Paige, 614, 11 Wend. 312.

[2] 45 & 46 Vict., c. 75, § 3; Re Genese, 16 Q. B. D. 700; Re Clark (1898), 2 Q. B. 330.

[3] Woodward *v.* Spurr, 141 Mass. 283.

[4] Squire *v.* Dean, 4 Bro. C. C. 326; Smith *v.* Camelford, 2 Ves. Jr. 698; Dalbiac *v.* Dalbiac, 16 Ves. 116; Caton *v.* Rideout, 1 McN. & G. 599; Shirley *v.* Shirley, 9 Paige, 363; Rowley *v.* Unwin, 2 K. & J. 138; Beresford *v.* Armagh, 13 Sim. 643; Gardner *v.* Gardner, 1 Giff. 126.

[5] Parker *v.* Brooke, 9 Ves. 583; Atty.-Gen. *v.* Parnther, 3 Bro. C. C. 441; Foss *v.* Foss, 15 Ir. Ch. 215; Darkin *v.* Darkin, 17 Beav. 578; Walker *v.* Walker, 9 Wall. 743; Towers *v.* Hagner, 3 Whart. 48; Re Richards, 17 N. B. R. 562, Fed. Cas. No. 11,770.

[6] See Re Campbell, 17 N. B. R. 4, Fed. Cas. No. 2348.

ners any debt so wholly disconnected from the business of the firm, that he might have maintained an action upon it.[1]

§ 182. **Proof by Solvent Partner.** — A solvent partner may prove against the several estates of his co-partners for their respective shares of the final balance, without resorting to a bill;[2] and a retired partner, whom the new firm have agreed to indemnify against the old debts, and who has paid all that were outstanding, may prove the amount against the joint assets of the new firm.[3] It is immaterial that the payments are made after the proceedings in bankruptcy are begun.[4] The solvent or retired partner cannot prove while there are debts outstanding for which the firm are liable, because he would be competing with his own creditors.[5] This rule extends to proof against the separate estates, because the surplus of the separate assets which goes to the joint creditors might thereby be intercepted;[6] but if it can be shown that the joint creditors cannot in any event have an interest in the separate estate, because there will be no surplus, then proof is admitted.[7] Executors of a deceased partner are within the same rule, in respect to the balance due their testator or intestate, or to them as representatives for money left in the business.[8] If it appears probable that there are no joint debts outstanding, a possibility that there may be such will not prevent proof *de bene*.[9]

[1] Ex parte Richardson, 3 Dea. & Ch. 244; Ex parte Briggs, ib. 367; Hope v. Meek, 10 Ex. 829.

[2] Ex parte Taylor, 2 Rose, 175; Ex parte King, 17 Ves. 115.

[3] Ex parte Terrell, Buck, 345.

[4] See Fernald v. Clark, 84 Maine, 234.

[5] Ex parte Sillitoe, 1 Gl. & J. 374; Ex parte Carter, 2 Gl. & J. 233; Ex parte Ellis, ib. 312; Ex parte Robinson, 4 Dea. & Ch. 499; Ex parte Butterfield, De G. 570; Ex parte Garland, 10 Ves. 110; Ex parte Broome, 1 Rose, 69; Ex parte Collinge, 4 De G. J. & S. 533; Ex parte Maude, L. R. 2 Ch. 550; Ex parte Gordon, L. R. 10 Ch. 160, 1 App. Cas. 195; Re Phelps, 17 N. B. R. 144, Fed. Cas. No. 11,070; Re Savage, 16 N. B. R. 368, Fed. Cas. No. 12,381; Re Smith, 16 N. B. R. 113; Fed. Cas. No. 12,991; Sigsby v. Willis, 3 Ben. 371, Fed. Cas. No. 12,849; Re Frost, 3 N. B. R. 736, Fed. Cas. No. 5135.

[6] Ex parte Collinge, 4 De G. J. & S. 533; Lacey v. Hill, L. R. 8 Ch. 441. See Re Hind, 62 L. T. 327.

[7] Re Head (1894), 1 Q. B. 638; Ex parte Topping, 4 De G. J. & S. 551; Ex parte Sheen, 6 Ch. D. 235.

[8] Ex parte Carter, 2 Gl. & J. 233; Ex parte Gordon, L. R. 10 Ch. 160, 1 App. Cas. 195.

[9] Ex parte Andrews, 25 Ch. D. 505.

§ 183. **Solvent Partner paying Debts.** — If a partner who has been fully exonerated by bankruptcy, or otherwise, takes up joint debts beyond his proportion, he may prove in respect to them;[1] so, if the retiring partner has a bond, or other promise, from the remaining partners, and creditors have agreed to look to the latter alone, or so much time has elapsed that it may be presumed that there are no creditors of the former firm.[2]

In a recent case the offer of proof by a retired partner, who had not paid the joint debts, was properly rejected, on the ground that the undertaking to indemnify him did not create a contingent debt or liability;[3] but the court criticised a decision holding a retired partner barred by the discharge of the remaining partners,[4] which is equally sound, because he might have paid the joint debts and have proved for the balance.

If the liability of one partner to another or to the firm arises from his fraudulent abstraction of funds, it can be proved against his separate estate, because no credit had been consciously given, and though provable as a debt, it is not a debt in the ordinary sense.[5]

If, however, the other partners have assented, or have condoned the offence, or, having knowledge or the means of knowledge, have failed to complain, the exception does not arise.[6]

§ 184. **Debts between Trade and Trade.** — In England, if one or more members of a firm carry on a distinct trade, and debts are contracted "between trade and trade" for goods sold, one firm may prove the amount against the other, — that is to say, their assignees may settle the accounts as if one were the creditor; but this does not apply to an advance of money, even by a partner who exercises the separate trade of a banker.[7]

This exception has not been recognized in the United States,

[1] Ex parte Atkins, Buck, 479; Re Hepburn, 14 Q. B. D. 394.
[2] Ex parte Hill, 1 Dea. 123.
[3] Fernald v. Johnson, 71 Maine, 437.
[4] Fisher v. Tifft, 12 R. I. 56.
[5] Ex parte Butterfield, De G. 570; Ex parte Westcott, L. R. 9 Ch. 626.
[6] McCauly v. McFarlane, 2 Desaus. Ch. 239.
[7] Ex parte St. Barbe, 11 Ves. 413; Ex parte Sillitoe, 1 Gl. & J. 374; Ex parte Williams, 3 M. D. & De G. 433; Ex parte Maude, L. R. 2 Ch. 550; Re Ridgway, 9 Morrell, 269.

where it is held, in the few cases which have arisen, that the distinction between a debt for goods and one for money is not well founded, and that a debt by one partner to another for either is only a part of the general account between the partners.[1]

§ 185. **Proof between Estates when some Partners are the same.** — Proof is admitted where the creditor firm contains a partner who is not a member of the debtor firm, because the former firm is not competing with its own creditors, but proving a debt which in equity is distinct from the accounts of either firm, *inter sese*,[2] but not where the debtor firm consists of the creditor firm and some others, because the latter are liable for all debts.[3]

Where there are equitable grounds against the proof, it is refused, though the law has otherwise been complied with, as where the treasurer of a charitable society deposited the money with his firm, who were bankers, and he was bound as principal, and his co-partner as surety, for the safe investment of the money, and all were bankrupt, but the separate estate of the surety turned out to have a surplus; his estate was not permitted to prove against the separate estate of the principal for any part of the dividend paid upon the bond, because the proof would enure to the benefit of the joint estate, which had been the real defaulter.

§ 186. **Torts.** — Damages for personal injuries, or for libel and slander, or for injuries to property, excepting the conversion of goods and chattels, or for negligence, or for false representations of the credit of a third person, have never been included within the class of debts provable against a bankrupt's estate, unless judgment has been entered or a final

[1] Somerset Potters Works *v.* Minot, 10 Cush. 592; Re Lane, 10 N. B. R. 135, Fed. Cas. No. 8044.

[2] Ex parte Thompson, 3 Dea. & Ch. 612; Ex parte Cama, L. R. 9 Ch. 686; Re Buckhause, 2 Lowell, 331, Fed. Cas. No. 2086; Lindley, Partnership (6th ed.), 743; Adams Eq. (5th Am. ed.), 464, note 1; 1 Story Eq. (13th ed.), § 680; Crampton *v.* Kent, 69 Vt. 228. [Under the act of 1898 a bankrupt firm may prove against the estate of the bankrupt partners, and *vice versa*. § 5 *g*, *infra*, § 468.]

[3] Re Savage, 16 N. B. R. 368, Fed. Cas. No. 12,381.

award made against him before the bankruptcy, a verdict not being enough.[1] Our late statute logically and wisely included among provable debts all demands on account of goods and chattels wrongfully converted, taken, or withheld by the bankrupt.[2] This provision was taken from the statute of Massachusetts, in which it was adopted to save the "absurdity and injustice" of leaving to the election of the creditor whether his claim should be a debt or a tort, and be discharged or not.[3] Goods and chattels in this connection include, I suppose, bills of exchange and other choses capable of conversion. It was the opinion of the bar that under the late statute damages for the breach of a promise to marry were provable, though those damages are of a somewhat peculiar nature closely resembling a tort. They were formerly not provable in England, but that was because they were unliquidated. Of course if the parties have agreed to settle a right of action for a tort, and convert it into a debt before the bankruptcy, the debt may be proved.

§ 187. **Proof of Costs against a Plaintiff.** — Costs incurred by the bankrupt as plaintiff, in an action in which the judgment of nonsuit was not entered at the time of his bankruptcy, could not formerly be proved in England, and have never been proved in this country, because they could not be considered a debt before judgment;[4] but actual taxation of the costs need not precede the bankruptcy;[5] and so of costs, which depend

[1] Crouch *v.* Gridley, 6 Hill, 250; Kellogg *v.* Schuyler, 2 Denio, 73; Black *v.* McClelland, 12 N. B. R. 481, Fed. Cas. No. 1462; Zimmer *v.* Schleehauf, 115 Mass. 52; Buss *v.* Gilbert, 2 M. & S. 70; Ex parte Charles, 16 Ves. 256; Re Newman, 3 Ch. D. 494; Re Seager, 8 Morrell, 216.

[2] Act of 1867, § 19; 14 Stat. 525; R. S. § 5067. There is no such provision in the act of 1898.

[3] See the report of the very able commissioners who framed the insolvent law of Massachusetts, in Cutler (ed. 1853), 153 *et seq.*

[4] Ex parte Baum, L. R. 9 Ch. 673; Re Scarth, L. R. 10 Ch. 234; Re Newman, 3 Ch. D. 494; Ex parte Goodier, 22 L. T. N. S. 426; Zinn *v.* Ritterman, 2 Abb. N. S. 261; Kellogg *v.* Schuyler, 2 Den. 73; Hun *v.* Cary, 82 N. Y. 65; Re Hennocksburgh, 7 N. B. R. 37, Fed. Cas. No. 6367; Black *v.* McClelland, 12 N. B. R. 481, Fed. Cas. No. 1462; Re Schuchardt, 15 N. B. R. 161, Fed. Cas. No. 12,483; Hodges *v.* Chace, 2 Wend. 248. [Under the act of 1898 costs are provable if the trustee refuses to carry on the action. § 63 (2), *infra*, § 526.]

[5] Holding *v.* Impey, 7 Moore, 614.

upon no debt, imposed on a defendant, such as costs upon a special decree in equity.[1]

Under the very liberal terms of the English law of 1869, such costs, in an action of contract, are considered a liability incurred by the debtor, and are provable.[2] It is otherwise if the action is for a trespass or other wrong.[3] On the same principle a creditor may, under that statute, add to his provable debt arising by contract the costs of attempting to recover it, though unascertained at the bankruptcy.[4]

§ 188. **Proof of Costs against a Defendant.** — In respect to a plaintiff's costs, the somewhat artificial rule obtained in England before 1869 that if the creditor, having a provable debt, had obtained a verdict before the bankruptcy, he might add the costs as an increment; but if his case had not advanced to verdict, he could not.[5]

A provable debt will be discharged, and therefore some means should be given for proving the costs which have accrued upon it, for they will go with it. It would seem that the courts of bankruptcy, which are courts of equity, might have admitted the proof. At least, they might have refused to enjoin the action unless some provision were made for such proof.

In this country the practice as to a plaintiff's unascertained costs upon a provable debt has not been settled by decision.[6] They were provable by our late statute.[7]

§ 189. **Charges and Expenses.** — The law concerning the proof of expenses accruing after the beginning of the bankruptcy, such as the costs of protest on bills of exchange, seems

[1] Ex parte Hill, 11 Ves. 646; Ex parte Eicke, 1 Gl. & J. 261.

[2] Ex parte Peacock, L. R. 8 Ch. 682.

[3] Ex parte Newman, 3 Ch. D. 494.

[4] Re Gen. So. Am. Co., 7 Ch. D. 637; Re Gillespie, 16 Q. B. D. 702.

[5] Ex parte Poucher, 1 Gl. & J. 385; Ex parte Helm, Mont. & McA. 70; Aylett v. Harford, 2 W. Bl. 1317; Ex parte Cocks, De G. 446; Ex parte Ferris, 2 M. D. & D. 746; Watts v. Hart, 1 B. & P. 134; Ex parte Simpson, 3 Bro. C. C. 46; Hurst v. Mead, 5 T. R. 365. [In Maine a provable debt cannot be proved if it is reduced to judgment pending the proceedings. Emery, Appellant, 89 Maine, 544.]

[6] See Cothren's App., 59 Conn. 545; Jamison's Estate, 163 Pa. St. 143.

[7] Stockwell v. Woodward, 52 Vt. 228. Act of 1898, § 63 (3), allows proof of costs incurred in an action on a provable debt, *infra*, § 526.

to be in some doubt. It is commonly said in the text-books that these charges can be proved only when they accrued before the bankruptcy. But, since the law requires of the holder to make demand and give notice precisely as if the parties were solvent, and since these expenses will be discharged by the certificate, they should be provable as an increment to the debt; and such I consider the sounder doctrine. Damages such as re-exchange can be proved against the estate of the acceptor though arising after his bankruptcy.[1]

§ 190. **Torts, Fines, and Penalties.** — A fine, or penalty, or costs imposed upon the bankrupt as a punishment, is not usually a provable debt;[2] but may be so if any statute makes it a debt, or provides for its being collected by civil process, or gives such an alternative right of collection to the government, or to the person who has suffered the injury.[3]

Attachments for contempt are treated as civil, if they are merely for the enforcement of a debt, and as *quasi* criminal, if they are intended as punishment for disobedience.[4]

§ 191. **Voluntary Bonds, Notes, etc.** — It was formerly held in England that money due upon a voluntary bond, given for a good, but not for a valuable consideration, could not be proved.[5] The theory of these decisions was, that as bankruptcy is equitably administered, and equity disregards a seal, it will require an actual consideration.

These cases have been overruled upon the ground that such a bond creates a legal debt which will be discharged, and that the courts of bankruptcy cannot discriminate between valid

[1] Francis *v.* Rucker, Ambl. 672; Walker *v.* Hamilton, 1 De G. F. & J. 602; Re Gen. S. Am. Co., 7 Ch. D. 637; Re Gillespie, 16 Q. B. D. 702.

[2] Rex *v.* Robinson, 2 Burr. 799; Rex *v.* Norris, 4 Burr. 2142; People *v.* Spalding, 10 Paige, 284; Re Sutherland, Deady, 416, Fed. Cas. No. 13,639; Bancroft *v.* Mitchell, L. R. 2 Q. B. 549; Ex parte Graves, L. R. 3 Ch. 642.

[3] Cobb *v.* Symonds, 5 B. & Ald. 516; Re Rosey, 8 N. B. R. 509, Fed. Cas. No. 12,066; Barnes *v.* United States, 12 N. B. R. 526, Fed. Cas. No. 1023; Reg. *v.* Hills, 2 E. & B. 176; Lees *v.* Newton, L. R. 1 C. P. 658; Rex *v.* Edwards, 9 B. & C. 652. [Proof may now be made for the pecuniary loss sustained on account of penalties imposed by the United States, a State, county, district, or municipality. Act of 1898, § 57j; *infra*, § 520.]

[4] Hendryx *v.* Fitzpatrick, 19 Fed. Rep. 810 and cases cited.

[5] Ex parte Hall, 1 Rose, 30; Ex parte Spurrier, Mont. 246.

legal debts, unless when there is some positive equitable defence.[1] It does not touch those cases which hold that a bond or judgment given as security for a debt of the obligor or judgment debtor himself can only be proved for the actual amount of the debt.[2]

A voluntary note cannot be proved by the first holder; nor can a note given merely in exchange for such a one.[3]

But a bond given in consideration of forbearance to sue a voluntary bond has a valuable consideration, and could always be proved. So a barrister's fees, which are gratuitous in England, could not be proved; but if an attorney received fees for a barrister, and became bankrupt, the amount was provable by the barrister against the assets of the attorney.[4]

§ 192. **Debts bought after Bankruptcy.** — Debts bought after the bankruptcy may be proved in full, and not merely for the amount paid for them, which is no concern of other creditors;[5] but the buyer can only prove for so much as the seller might have proved for, even though the evidence of debt is a negotiable note not due, because the proof relates back to the beginning of the proceedings, which are to be taken notice of by all the world.[6] A case is often cited as deciding that a note bought after the bankruptcy cannot be proved, but the decision was that the buyer could not prove in his own name.[7] The English practice and that of Massachusetts[8] required the proof to be made in the name of the owner at the time the proceedings were begun, and the buyer could

[1] Ex parte Pottinger, 8 Ch. D. 621; Re Coates, 9 Morrell, 87.

[2] Ex parte Bloxham, 6 Ves. 449; Ex parte Reader, Buck, 381.

[3] Robson, 7th ed., 262; Re Vere, 2 Mont. & A. 123; Re Cornwall, 4 N. B. R. 400; Fed. Cas. No. 3251.

[4] Ex parte Berry, 19 Ves. 218; Re Hookins, 3 De G. & Sm. 549; Re Hall, 2 Jur. N. S. 1076. [Gambling debts cannot be proved. Re Deerhurst, 8 Morrell, 97; Re Cronmire, 5 Manson, 30.]

[5] Humphreys *v.* Blight, 4 Dall. 370, Fed. Cas. No. 6870; Re Murdock, 1 Lowell, 362, Fed. Cas. No. 9939; Re Fortune, 1 Lowell, 306, Fed. Cas. No. 4955; Re Strachan, 3 Biss. 181, Fed. Cas. No. 13,519; Green *v.* Hood, 42 Ill. Ap. 652.

[6] Ex parte Deey, 2 Cox, 423; Ex parte Rogers, Buck, 490; Ex parte Atkins, ib. 479; Re Lane, 2 Lowell, 305, Fed. Cas. No. 8043.

[7] Ex parte Isbester, 1 Rose, 20. [In England now a debt cannot be proved if it was incurred after notice of an act of bankruptcy. Buckwell *v.* Norman (1898), 1 Q. B. 622.]

[8] Re Murdock, 1 Lowell, 362, 365, Fed. Cas. No. 9939.

require such proof to be made; under the act of Congress the proof was in the name of the true owner.[1]

§ 193. **Amount for which Proof may be made.** — The general rule is that proof is to be made for the amount for which a judgment or decree might have been obtained in court at the time of the bankruptcy; understanding always that equitable defences are admitted in bankruptcy. It follows that when the bankrupt is the principal debtor no greater sum than his actual debt can be proved, though he may have given his direct or collateral obligations, or promise not secured by pledge or mortgage, for a much larger amount.[2] Where two partners pledged notes of the firm which were justly due them for advances, it was held that the creditor could prove them.[3] If the creditor holds bonds or notes secured by mortgage or pledge, he may prove for the whole amount as against the property.[4]

This general rule does not apply to persons who are collaterally liable, as I shall show in the next section.

§ 194. **Proof for more than could be recovered at Law.** — A creditor may prove in full against all the parties to notes, bills, and other securities excepting his own debtor, although they may have been assigned to him as collateral security for a less amount, and though the equities between his debtor and the other parties are such that, at law, he could have obtained judgment for only the true amount of his debt;[5] because he

[1] Re Murdock, 1 Lowell, 362, Fed. Cas. No. 9939.

[2] Ex parte Reader, Buck, 381; Ex parte Bloxham, 6 Ves. 449, per *Eldon, L. C.*; Ex parte Farnsworth, 1 Lowell, 497, Fed. Cas. No. 4672; Third Nat. Bank *v.* E. R. R. Co., 122 Mass. 240; Re Blakely Ordnance Co., L. R. 8 Eq. 244. [A creditor can prove against the guarantor of a debt only the amount still due. Re Blakeley, 9 Morrell, 173.]

[3] Miller's River Bank *v.* Jefferson, 138 Mass. 111.

[4] Duncomb *v.* N. Y. etc. R. R. Co., 84 N. Y. 190; Tod *v.* Land Co., 57 Fed. Rep. 47; Furness *v.* Union Bank, 147 Ill. 570.

[5] Ex parte Newton, 16 Ch. D. 330, s. c. *nom.* Ex parte Griffin, 29 W. R. 407; Ex parte Crossley, 3 Bro. C. C. 237; Ex parte Wildman, 1 Atk. 109; Ex parte King, Cooke, 7th ed., 168; English *v.* Darley, 2 B. & P. 61, per *Ld. Eldon*; Ex parte Adam, 2 Rose, 36; Ex parte Martin, ib. 87; Ex parte Sammon, 1 Dea. & Ch. 564; Ex parte Bloxham, 6 Ves. 449, 600; Ex parte Fairlie, 3 Dea. & Ch. 285; Ex parte Solarte, ib. 419; Ex parte Vere, 4 Dea. & Ch. 295; Re Babcock, 3 Story R. 393, Fed. Cas. No. 696; Bailey *v.* Nichols, 2 N. B. R. 478, Fed. Cas. No. 741; Downing *v.* Traders' Bank, 2 Dill. 570.

holds a just debt for the full amount, and the reason he could not recover it against a solvent person not primarily liable is that he would be a trustee for that very person for the excess above the debt for which he held it as collateral.

So, where A. is bound for a debt of B., by an agreement between themselves to which the creditor is not a party, and A. becomes bankrupt, and the creditor proves against his estate, A.'s assignee may prove the full amount against B.'s estate in bankruptcy, and not merely the amount of dividend.[1]

Where two out of four partners were bankrupt, and a third was insolvent, and the fourth paid all the debts, he was admitted to prove for one-half the deficiency against the separate estate of each of his co-partners.[2]

The rule of proof in full does not apply to sureties upon a bond. The penalty is not their real debt any more than it is that of their principal; and sureties upon any sort of contract are liable for only what is due thereon by the principal.

These cases depend upon the equitable doctrine that proof is not payment. When the creditor has received actual payment for dividends, the several estates will settle future dividends according to the equities between them.

§ 195. **Amount of Proof by Surety.** — The surety can prove for a debt only when he has paid the whole, or a part in satisfaction of the whole. It follows that the creditor is to prove the whole when he has received a part not in satisfaction of the whole.[3] How the dividends are to be apportioned is no

136, Fed. Cas. No. 4046; Ex parte Kelty, 1 Lowell, 394, Fed. Cas. No. 7681; Ex parte Farnsworth, 1 Lowell, 497, Fed. Cas. No. 4672; Ex parte Schofield, 12 Ch. D. 337; Re Weeks, 13 N. B. R. 263, Fed. Cas. No. 17,349; Sohier *v.* Loring, 6 Cush. 537; Nat. Mt. Wollaston Bank *v.* Porter, 122 Mass. 308; Bank *v.* Kendrick, 92 Tenn. 437; Citizens' Bank *v.* Patterson, 78 Ky. 291; So. Mich. Bank *v.* Byles, 67 Mich. 296; In re Meyer, 78 Wis. 615; In re Hobson (Ia.), 46 N. W. 1095; Benning *v.* Thibaudeau, 20 Can. S. C. 110.

[1] Ex parte Norwood, 3 Biss. 504, Fed. Cas. No. 10,364; In re Sass (1896), 2 Q. B. 12.

[2] Ex parte Watson, 4 Mad. 477.

[3] Ex parte Hunter, 2 Gl. & J. 7; Ex parte Sarjeant, ib. 23; Re Ellerhorst, 5 N. B. R. 144, Fed. Cas. No. 4381; Downing *v.* Traders' Bank, 11 N. B. R. 371, Fed. Cas. No. 4046; Re Souther, 2 Lowell, 320, Fed. Cas. No. 13,184; In re Rea, 82 Ia. 231, *contra*. See Boltz Est., 133 Pa. St. 77.

concern of the creditors of the principal; nor is it for them to say that the surety's money has paid the debt of the principal.

There are decisions in England that if a surety has paid part of a debt, after the beginning of the bankruptcy, he can prove for the remainder only against the principal debtor.[1] The question is, in reality, one of fact, namely, whether the payment was made on account of the principal debtor. If so, it is a part payment of the debt; if not, not

In the United States it is held that a payment by the surety of money on account, or for his own release, after the bankruptcy of his principal, is not a payment of the debt, and is not to be credited when proof is offered against the estate of the principal.[2]

I understand the earliest cases in England to have taken the true distinction,[3] and this will be the law of that country when the case is fully argued. The creditor may prove in full, if the parties have so agreed beforehand.[4] And the law should imply such an agreement when it is essential to the justice of the case.

Of course, when he who appears to be surety is, in truth, the principal, a payment by him must be deducted when proof is afterwards made against the actual surety; because, though the creditor may have the right to treat him as the principal, yet a payment of part of the debt by the real principal cannot be treated as anything less than a satisfaction *pro tanto*.

§ 196. **Credits after Proof.** — When proof has been made against several estates, the creditor draws dividends for the full amount from each, whether principals or sureties, notwithstanding payments from the others, until he has received his debt with interest.[5] But when the debt proved consists in

[1] Taylor *v.* Mills, Cowp. 525; Paul *v.* Jones, 1 T. R. 599; Howis *v.* Wiggins, 4 T. R. 714.

[2] Re Ellerhorst, 5 N. B. R. 144, Fed. Cas. No. 4381; Downing *v.* Traders' Bank, 2 Dillon, 136, Fed. Cas. No. 4046; Ex parte Talcott, 2 Lowell, 320, Fed. Cas. No. 13,184; 1 Ames, Select Cases on Bills and Notes, 878 and note; Re Pulsifer, 14 Fed. Rep. 247, per *Blodgett, J.*

[3] Ex parte Ryswicke, 2 P. Wms. 89, 1 Atk. 108, note. See Ex parte Turner, 3 Ves. 243; Ex parte Lefebvre, 2 P. Wms. 407. See remarks of Eldon, L. C., in Ex parte Leers, 6 Ves. 644.

[4] Ex parte Hope, 3 M. D. & De G. 720; Midland Bank *v.* Chambers, L. R. 7 Eq. 179; L. R. 4 Ch. 398.

[5] Ex parte Martin, 2 Rose, 87 (the marginal note is inaccurate); Ex parte

whole or in part of bills or notes having several names, it is treated as several proofs; and if any one bill or note is paid by one who is bound to indemnify the bankrupt, the creditor's aggregate proof must be diminished to that extent, in justice to the creditors of the bankrupt, who was only a surety.[1]

On the other hand, if the bill or note has been paid or satisfied by a surety, he has a right to hold the proof by subrogation.[2]

§ 197. **Surety for Part of Debt entitled to Share of Dividends.** — It follows from the right of subrogation that when a banker proves a balance of account consisting in or secured by notes or bills made, accepted, or indorsed by third persons who hold the relation of sureties or *quasi* sureties to the bankrupt, if those persons pay the bills or notes, each stands subrogated, *pro rata*, to the creditors' proof, and may require him to pay them a proportionate part of the dividend.[3]

So a surety or guarantor for part of a debt, or for goods or advances to a certain amount, is subrogated to a proportionate dividend, when he pays that amount to the creditor who has proved his larger debt.[4]

This right the surety may waive by agreeing that dividends shall not be credited to him, and he then, in effect, becomes surety for the ultimate balance.[5] It has been lately held that

Reed, 3 Dea. & Ch. 481; Ex parte Vere, 4 ib. 295, 321; Re Warrant Finance Co., L. R. 4 Ch. 643; Re Joint Stock Co., L. R. 5 Ch. 86 and note 2; Re Humber Co., ib. 88. Two cases before Sir J. Leach, V. C., were decided otherwise. Ex parte Paton, 1 Gl. & J. 332; Ex parte Gass, ib. 338, note. In both these cases the bankrupt was surety only, though this should make no difference, the settlement between the different parties liable to the creditor being immaterial to him. The cases may be distinguishable by the fact that in both the principal was solvent; if not, they are inconsistent with those above cited.

[1] Ex parte Burn. 2 Rose, 55; Ex parte Barratt, 1 Gl. & J. 327; Ex parte Hornby, De G. 69.

[2] Ex parte Sammon, 1 Dea. & Ch. 564; Ex parte Turner, 3 Ves. 243; Ex parte Rushforth, 10 Ves. 409; Ex parte May, Mont. & Ch. 18, 31, per *Sir G. Rose*.

[3] Ex parte Turner, 3 Ves. 243; Ex parte Holmes, 4 Dea. 82.

[4] Ex parte Brook, 2 Rose, 334; Thornton *v.* McEwan, 1 Hem. & M. 525; Ex parte Rushforth, 10 Ves. 409; Paley *v.* Field, 12 Ves. 435; Bardwell *v.* Lydall, 7 Bing. 489; Hobson *v.* Bass, L. R. 6 Ch. 792; Gray *v.* Seckham, L. R. 7 Ch. 680; Raikes *v.* Todd, 8 A. & E. 846.

[5] Ex parte Miles, De G. 623; Ex parte Hope, 3 M. D. & De G. 720; Gee *v.* Pack, 33 L. J. Q. B. 49; Midland Bank *v.* Chambers, L. R. 7 Eq. 179; L. R. 4 Ch. 398; Ex parte Nat. Prov. Bank, 17 Ch. D. 98.

when the surety is aware that the debt may be larger than his undertaking, and guarantees the debt, limiting his own liability to a certain sum, he has no equity to receive any part of the dividend, because, as the courts say, that equity depends on his guaranteeing a certain debt, which he has a right to suppose will not be exceeded.[1] This distinction seems somewhat nice, but has been adopted by an able judge in this country.[2]

If the surety becomes responsible for part of a debt because he is interested to that extent in the adventure, he is equitably a principal, and has no right of substitution.[3]

§ 198. **Amount of Proof; Interest.** — All debts are to be proved as of the same date. Interest is to be reckoned to that day on all debts which bear interest, or on which interest would be ordered to be assessed by a jury.[4] If the debt is not payable at the date of the bankruptcy, and does not bear interest, a rebate is to be made at such rate as the law governing the contract, construed with reference to the contract itself, requires.[5] The English practice was formerly embarrassed in the allowance of interest by the inability of the courts to assess damages; but that has been corrected by statute, and their law is now substantially like ours, excepting that when there is no agreement for interest the rate is to be four per cent.[6] In the English practice the rebate is made from the dividend instead of the proof.[7]

§ 199. **Proof for less than Actual Debt.** — In the case of the principal debtor himself proof is, in a certain sense, the equivalent of payment; and an unsecured creditor, as we have seen,

[1] Ellis *v.* Emmanuel, 1 Ex. D. 157.

[2] Dumont *v.* Fry, 14 Fed. Rep. 293.

[3] Liverpool Bank *v.* Logan, 5 H. & N. 464.

[4] Re Murray, 6 Paige, 204; Brown *v.* Lamb, 6 Met. 203; Prichett *v.* Newbold, Saxton, 571; Sloan *v.* Lewis, 22 Wall. 150; Re Orne, 1 Ben. 361, Fed. Cas. No. 10,581. [A surety who has paid the debt may prove for interest also. Re Evans, 4 Manson, 114.]

[5] Act of 1867, § 19; 14 Stat. 525; R. S. § 5067; Re Orne, 1 N. B. R. 57, Fed. Cas. No. 10,581; Robson, 7th ed., p. 241; Act of 1898, § 63 (1); *infra*, § 526.

[6] B. A. 1883 (46 & 47 Vict., c. 52), schedule 2, § 20, re-enacting earlier laws since 1849.

[7] Ib. § 21, which is also a re-enactment. [Interest runs to the date of the receiving order. Re Bonacino, 1 Manson, 59.]

shall not prove against his estate more than the actual debt, though he may hold a legal obligation for more. In no other way can the equality of creditors be carried out.

Proof for less than could be recovered has been required in some few cases of penalties, as where assignees neglecting to deposit money, or banks refusing their bills, were chargeable with a very high rate of interest; on the bankruptcy of an assignee or the bank, the proof was admitted only with ordinary interest.[1]

§ 200. **Creditor may hold his Full Security.** — It is to be noted that a debtor has a right to give his creditor specific property to any amount as security, and where this security is in the form of notes or bonds secured by mortgage, the creditor may have his full share of the property according to the tenor of his notes or bonds, until he receives payment of his actual debt. Indeed, this rule stands on precisely the ground of that stated in § 194, namely, that the creditor is to have the full benefit of all his collateral securities.

§ 201. **Double Proof; Creditor and Surety.** — Equality among the creditors requires that the same debt should be proved but once against the same estate; and, therefore, when the holder of a bill or other creditor has proved, a surety paying the remainder cannot prove in any form;[2] and if both principal and surety are bankrupt, the assignees of the surety are in the same situation.[3] If the solvent surety pays the debt, he is subrogated to the creditor's proof;[4] and if the assets of the two bankrupt estates pay the creditor in full, the assignees of the surety are subrogated for future dividends against the principal debtor, until their estate receives the amount which it has paid the creditor in dividends.[5] This being the limit of

[1] Atlas Bank *v.* Nahant Bank, 3 Met. 581. See Wallis *v.* Smith, 21 Ch. D. 243.

[2] Ex parte Marshal, 1 Atk. 129; Cummings *v.* Thompson, 7 Met. 132; Re Morse, 11 N. B. R. 482, Fed. Cas. No. 9853; Ex parte Read, 1 Gl. & J. 224; Baines *v.* Wright, 15 Q. B. D. 102.

[3] Ex parte Marshal, 1 Atk. 129; Rigby *v.* Macnamara, 2 Cox, 415.

[4] Ex parte Rushforth, 10 Ves. 409; Robson, 7th ed., p. 304; Act of 1867, § 19; 14 Stat. 525; R. S. § 5070; Act of 1898, § 57 i, *infra*, § 526.

[5] Ex parte Johnson, 3 De G. M. & G. 218; Ex parte Greenwood, Buck, 237; Ex parte Solarte, 3 Dea. & Ch. 419.

their right, if the assignees or the principal pay this amount to the assignees of the surety, the latter cannot prove against the estate of the principal.[1]

If a debt has been proved, the creditor cannot, in addition, prove the liability arising out of a collateral covenant for its security, though such a liability, by itself considered, be provable by the very terms of the statute.[2]

§ 202. **Proof against both Joint and Separate Estates.** — In England, it was held that the rule against double proof deprived a creditor who held the joint and several promises of partners from proving against both estates. But the joint and separate estates of partners are settled as if they were wholly distinct; and to reject proof against one, when the creditor holds the obligation of both, is unjust. A false analogy between the proof of a debt and a judgment against solvent persons was one of the reasons given for the doctrine.[3] This rule, though followed, was condemned by many eminent judges in England,[4] but was affirmed by the House of Lords on the principle of *stare decisis*,[5] — a principle which it is one of the great privileges of that high court to disregard when the law has been misunderstood by the inferior tribunals.

The rule has been changed by statute[6] in respect to express contracts, but the courts still follow the old doctrine in cases not within the language of the act, such as debts arising *ex delicto*.[7]

In the United States, one who has the joint and separate

[1] Ex parte European Bank, L. R. 7 Ch. 99.

[2] Deering *v.* Bank of Ireland, 12 App. Cas. 20, reversing Re Killen, Ir. L. R. 15 Ch. 388.

[3] Ex parte Rowlandson, 3 P. Wms. 405; Ex parte Bond, 1 Atk. 98; Ex parte Blankenhagen, Cooke, 7th ed., 259; Ex parte Moult, 2 Dea. & Ch. 419; Ex parte Bevan, 10 Ves. 107; Ex parte Bank of England, 2 Rose, 82; Ex parte Husbands, 2 Gl. & J. 4; Ex parte Hinton, De G. 550; Ex parte Goldsmid, 1 De G. & J. 257.

[4] See Ex parte Bevan, 10 Ves. 107; Ex parte Goldsmid, 1 De G. & J. 257; Ex parte Barnewall, 6 De G. M. & G. 795; Ex parte Thornton, 28 L. J. (Bky.) 4.

[5] Goldsmid *v.* Cazenove, 7 H. of L. 785.

[6] Ex parte Honey, L. R. 7 Ch. 178; Ex parte Stone, L. R. 8 Ch. 914; Simpson *v.* Henning, L. R. 10 Q. B. 406; Ex parte Harding, 12 Ch. D. 557.

[7] Ex parte Wilson, L. R. 7 Ch. 490; Ex parte Carne, L. R. 3 Ch. 463; Plumer *v.* Gregory, L. R. 18 Eq. 621; Ex parte Adamson, 8 Ch. D. 807.

obligation of partners may prove against all the estates of the parties bound to him, treating the firm as distinct from its several partners.[1]

§ 203. **Double Proof; Breach of Trust.** — When a partner has committed a breach of trust by lending to his firm money which belongs to him as a trustee, and his partners have knowledge of the wrong, they are joint and several wrongdoers, and the *cestui que trust* may in this country prove against the joint and against each separate estate.[2] They could have so proved in England but for the rule mentioned in the last preceding section, which required them to elect, and by the latest statute and rules they may prove against the joint and separate estate of the trustee.[3]

If the other partners are ignorant of the breach of trust, the firm are mere joint debtors for money lent, and the trustee for breach of trust; the separate estates of the innocent partners are not liable.[3] This rule will apply in the United States.

§ 204. **Double Proof; Exchanged Notes and Bills.** — If A. and B. exchange notes for an equal amount, for mutual accommodation, and each indorses and negotiates the note of the other, and both become bankrupt, there can be proof by *bona fide* holders against both estates, amounting to a double proof against both. But if only A. is bankrupt, and B. has not negotiated A.'s note, B. must take up his own note before he can

[1] Re Farnum, 6 Law Reporter, 21, Fed. Cas. No. 4674; Ex parte Babcock, 3 Story R. 393, Fed. Cas. No. 696; Borden *v.* Cuyler, 10 Cush. 476, per *Cushing, J.*; Fuller *v.* Hooper, 3 Gray, 334; Meade *v.* Nat. Bank Fayetteville, 6 Blatch. 180, Fed. Cas. No. 9366; Emery *v.* Canal Bank, 3 Cliff. 507, Fed. Cas. No. 4446; Re Bradley, 2 Biss. 515, Fed. Cas. No. 1772; Re Howard, 4 N. B. R. 571, Fed. Cas. No. 6750; Stephenson *v.* Jackson, 9 N. B. R. 255, Fed. Cas. No. 13,374; Re Foot, 8 Ben. 228, Fed. Cas. No. 4906; Ontario Bank *v.* Chaplin, 20 Can. S. C. 152; Ex parte Nason, 70 Maine, 363; Hill *v.* Cornwall (Ky.), 26 S. W. 540, *contra.*

[2] Re Tesson, 9 N. B. R. 378, Fed. Cas. No. 13,844; Re Baxter, 18 N. B. R. 62, Fed. Cas. No. 1119; Re Jordan, 2 Fed. Rep. 319.

[3] Baring's Case, 1 Mer. 611; Ex parte Watson, 2 Ves. & B. 414; Ex parte Heaton, Buck, 386; Ex parte Poulson, 1 De G. 79; Ex parte Burton, 3 M. D. & De G. 364; Ex parte Woodin, ib. 399; Wright's Case, 6 De G. M. & G. 795; Front's Case, ib. 801; Re Norris, L. R. 4 Ch. 280; Ex parte Adamson, 8 Ch. D. 807; Ex parte Geaves, 8 De G. M. & G. 291; Re Parker, 4 Morrell, 135.

prove A.'s; else there would be double proof without the excuse that the creditor is a holder for value;[1] and it has been held that even B.'s assignee cannot prove on A.'s note under similar circumstances,[2] which is much more doubtful, because one note is a good consideration for the other, and the true equities between the estates could be best worked out in many cases by an adjustment of the dividends.[3]

It was held by Lord Loughborough that where there were outstanding in the hands of the creditors exchanged bills against both estates, though unequal in amount, no proof could be made by either estate against the other, except for the cash balance, rejecting all bills on both sides.[4] This case has been a subject of much discussion and misunderstanding; some courts and writers having apparently inverted the maxim, and laid down that the cash balance could always be proved. In two late cases, however, it has been held that paper is to be rejected from the account, if at all, only when it is purely exchanged paper between the parties bankrupt, the court saying that the true and only test in such cases is, whether an action could be maintained for the balance sought to be proved.[5] Therefore, where bills have been given for part of a cash balance they must go to diminish the balance *pro tanto;* and where bills were owned by bankrupts whose firm contained one member different from the firm that exchanged the bills, they could prove them, though the other bills were outstanding. And where the exchanged paper has been indorsed without recourse, so that double proof cannot be made against one estate, the notes or bills for which that estate is primarily liable may be proved against it by the assignees of the other, the exchange being a good consideration for them.[6]

[1] Sarratt *v.* Austin, 4 Taunt. 200, 2 Rose, 112; Ex parte Everett, Ex parte Brown, Ex parte Ward, 2 Rose, 113, note; Ex parte Bloxham, 8 Ves. 531; Ohio L. & T. Co. *v.* Winn, 4 Md. Ch. 253.

[2] Ex parte Solarte, 3 Deg. & Ch. 419.

[3] Commissioner Williams of Massachusetts, once Chief Justice of the Common Pleas, so held in an unreported case.

[4] Ex parte Walker, 4 Ves. 373. See Ex parte Earle, 5 Ves. 833; Ex parte Rawson, Jac. 274; Ex parte Metcalfe, 11 Ves. 404; Byles on Bills, 13th ed., p. 451.

[5] Ex parte Macredie, L. R. 8 Ch. 535; Ex parte Cama, L. R. 9 Ch. 686; Ex parte Read, 1 Gl. & J. 224.

[6] See Ex parte Solarte, 3 Deg. & Ch. 419; Ex parte Greenwood, Buck, 237.

§ 205. **Time of proving; Limitations.** — Debts may be proved at any time when there are assets to be divided;[1] for, though the Statute of Limitations continues to run against the personal demand upon the bankrupt, all proofs of debt relate back to the beginning of the proceedings, and the assignees are trustees from thence forever, and there is no limitation unless expressly provided by the statute itself. In a case in the District of Massachusetts, debts were proved under the act of 1841 after thirty-eight years from the apparent close of the proceedings, fresh assets having come in, which furnished the occasion, but was not the cause of the right. In an administration suit in England orders were made ninety years after the declaration of the first dividend.[2] And in several of the cases cited below twenty or more years had passed.[3]

It was held in one case that when the parties had agreed to a limitation, as is not uncommon in contracts of insurance, the debt must be offered for proof before the expiration of that time, though the debtor had before then become bankrupt.[4] But a very able and sound opinion of the learned judge who decided that case seems inconsistent with it.[5]

A court may decide that a debt which is not presented until most of the parties are dead, and cannot be fully supported by proof, ought not to be admitted; but the decision will be one of fact, namely, that the existence of the debt is not made out.[6]

[1] [Under the act of 1898 proof must be made within a year of the adjudication. § 57 n, *infra*, § 520.]

[2] Ashley *v.* Ashley, 4 Ch. D. 757.

[3] Ex parte Ross, 2 Gl. & J. 46, 330; Sterndale *v.* Hankinson, 1 Sim. 393; Ex parte Johnson, 3 De G. M. & G. 218; Ex parte Peake, L. R. 2 Ch. 453; Joint Stock Co.'s Claim, L. R. 7 Ch. 646; Gest *v.* Heiskill, 5 Rawle, 134; Shoenberger *v.* Adams, 4 Watts, 430; Ostrom *v.* Curtis, 1 Cush. 461; Minot *v.* Thacher, 7 Met. 348; Re Eldridge, 12 N. B. R. 540, Fed. Cas. No. 4331; Re Robinson, 2 Lowell, 326, Fed. Cas. No. 11,941; West *v.* Creditors, 1 La. An. 365; Von Sachs *v.* Kretz, 19 N. B. R. 83; Vance *v.* Sanders, 8 Baxter, 294; Ex parte Boddam, 2 De G. F. & J. 625; Re Leiman, 32 Md. 225; Ohio L. & T. Co. *v.* Winn, 4 Md. Ch. 253; Re Wright, 6 Biss. 317, Fed. Cas. No. 18,068; Ex parte Peake, L. R. 2 Ch. 453; Re McKinney, 15 Fed. Rep. 912; Re Graves, 9 Fed. Rep. 816; McCandless' Estate, 61 Penn. St. 9.

[4] Re Firemen's Ins. Co., 8 N. B. R. 123, Fed. Cas. No. 4796.

[5] Re Wright, 6 Biss. 317, Fed. Cas. No. 18,068.

[6] See Ex parte Anderson, 14 Q. B. D. 606; Ex parte Sanderson, 8 De G. M.

In one case, where no debts had been proved, and the proceedings had been closed for some years, an able judge sustained a demurrer to a bill by the assignees to recover property fraudulently concealed from them; he held that they represented the creditors, and that it would be too late to make proof.[1] But since the creditors may have neglected to prove simply because there were no assets, and since they could undoubtedly prove if their previous failures to do so were the only objection, the case should have been determined upon its merits, not upon the Statute of Limitations.

When the statute fixes a time within which debts are to be proved, as in settling estates of persons deceased and in winding up corporations, but permits some discretion to the courts in extending the time, great liberality is always exercised in this respect.[2]

§ 206. **Laches in proving, as affecting the Right to a Declared Dividend.** — Delay to prove may amount to such laches that the court will not open the case to let the creditor in to share a dividend declared but not paid.[3] Even in this the courts are very liberal if the dividend is likely to be final, and if any excuse can be given for the delay will admit the creditor, if he will pay all the necessary expenses.[4]

§ 207. **Time of Proof; First Meeting.** — Though it is never too late to prove,[5] it may be too early. At the first meeting, creditors whose debts are contingent cannot, in general, prove, because there is no opportunity to assess their value, and no assignee with whom to agree upon it.

For similar reasons, creditors who hold security are not allowed to prove by our practice any part of the secured debt.

& G. 849; Morris' Case, Crabbe, 70, Fed. Cas. No. 9825. The cases of Ex parte Peachy, 1 Atk. 111, and Ex parte Mather, 3 Ves. 373, were considered obsolete in 1826. Eden, 2d ed., p. 100.

[1] Nicholas *v.* Murray, 5 Sawyer, 320, Fed. Cas. No. 10,223.

[2] Walker *v.* Lyman, 6 Pick. 458; Bufford *v.* Johnson, 34 N. H. 489. See Kean *v.* Lowe, 147 Ill. 564; Budd *v.* King, 83 Ia. 97.

[3] Ex parte Brees, 3 Dea. & Ch. 283.

[4] Ex parte Day, Mont. 212; Re Graham, 2 Dea. & Ch. 554; Ex parte Colton, 3 Dea. & Ch. 194; Strike's Case, 1 Bland, 57, 86; Hammond *v.* Hammond, 2 Bland, 306, 364; Ohio L. & T. Co. *v.* Winn, 4 Md. Ch. 253.

[5] See Rued *v.* Cooper, 109 Cal. 682.

In England, the practice was prescribed, and is now sanctioned by statute, to permit a secured creditor to value his security and vote upon the deficiency;[1] but he takes the risk of the valuation. If the property sells for more, he must pay the difference to the assignees, and if for less, he cannot increase his proof. This practice must have the effect to prevent secured creditors from proving at the first meeting, excepting where the choice of assignees is very important.

If a secured creditor surrenders his security, or a preferred creditor his preference, he may vote at the first meeting, according to the preponderance of authority.[2]

§ 208. **Suspending Proof.** — The commissioner, or register, or court have always had power to suspend the proof of a doubtful debt until after the choice of the assignees.[3] This practice has been adopted by some statutes.[4] The power should be exercised cautiously, with due regard to the importance of the issue and all the circumstances of the case.[5]

As, however, all proofs are subject to revision, and as the right to vote may be essential to the interests of a creditor, the practice has been very liberal to admit proofs for such amount as the creditors will positively agree to, leaving the precise sum to be adjusted afterwards.[6]

§ 209. **Discretionary with Court of Bankruptcy to await Decision of another Court.** — While it is within the power of the court of bankruptcy to delay or suspend a proof until the claim can be passed upon by a court of law or equity, this action is discretionary.

A very instructive case upon this subject arose in Scotland,

[1] [Under the act of 1898 a secured creditor may vote on the excess of his debt over the security as determined by the court. § 57 e, *infra*, § 520.]

[2] Robson, 7th ed., pp. 412, 357; Re High, 3 N. B. R. 191, Fed. Cas. No. 6473.

[3] Re Orne, 1 N. B. R. 57, Fed. Cas. No. 10,581; Re Lake Superior Canal Co., 7 N. B. R. 376, Fed. Cas. No. 7997.

[4] Act of 1867, § 23; 14 Stat. 528; R. S. § 5083; Act of 1898, § 57 d, *infra*, § 520.

[5] Re Lake Superior Iron Co., 7 N. B. R. 376, Fed. Cas. No. 7997; Re Bartusch, 9 N. B. R. 478, Fed. Cas. No. 1086; Re Jackson, 14 N. B. R. 449, Fed. Cas. No. 7123; Re Northern Iron Co., 14 N. B. R. 356, Fed. Cas. No. 10,322.

[6] Ex parte Simpson, 1 Atk. 70; Ex parte Ruffle, L. R. 8 Ch. 997.

Phosphate Sewage Company *v.* Molleson.[1] There the petitioning company maintained that the bankrupts were very largely indebted to them by reason of a fraudulent concealment concerning property in a foreign country, which had been conveyed by the bankrupts and others to the company at its formation, — a fraud not uncommon, and which would, undoubtedly, give rise to a provable debt. They were unable to prove the facts to the satisfaction of the trustee or of the court, and asked for a delay of the proceedings until they could establish their right under a bill in equity already pending in England. This delay the court refused; and the House of Lords sustained the refusal and the rejection of the debt,[2] upon the necessity for economy and despatch in bankruptcy. The sequel of this case is equally interesting. After the courts of Scotland had rejected the proof upon the facts, the plaintiffs obtained a decree in the suit in England for substantially their whole debt; and this decree contained an authority to prove in Scotland, where the proceedings were still pending. But the courts of Scotland held that the former decree made the rejection *res judicata*, and refused the proof;[3] and this decision was approved by the Lords.[4] In this case neither despatch nor justice appears to have been attained.

§ 210. **Objections to Proof; Equitable Defences.** — An objection to the proof of a debt is like a defence to an action upon it; and any objection, excepting that it has not matured, which could have been made in court, such as illegality, want of consideration, payment, etc., may be availed of against the proof; and anything which would be a good reply to the defence may be proved by the creditor.[5]

The administration being equitable, defences of an equitable character are admitted.[6]

The converse is not equally true. If a debt is illegal, — for instance, if it is void for usury under the provisions of a statute, — courts of bankruptcy do not admit it for the amount

[1] 1 Court Sess. (4th Series) 840.
[2] 1 App. Cas. 780.
[3] Phosphate Sewage Co. *v.* Lawson, 5 Court Sess. (4th Series) 1125.
[4] Phosphate Sewage Co. *v.* Molleson, 4 App. Cas. 801.
[5] Ex parte Smith, 1 Dea. & Ch. 267.
[6] Sewall *v.* Sparrow, 16 Mass. 24.

actually lent, because, though a court of equity would not enjoin an action at law without payment of that amount, it will not actively assist a creditor to recover an illegal debt, *melior conditio possidentis.*[1] But if the assignees come into equity to set aside the security for an usurious debt, the court may impose the condition that the debt shall be admitted to proof as unsecured.[2]

If money was advanced to the debtor, and the contract is not absolutely void, as, for instance, if it is only *ultra vires,* or even prohibited without a positive provision for confiscation, the courts will admit proof for money had and received. So if a note cannot be given in evidence for want of a stamp, the creditor may prove for the original consideration.[3]

A good illustration of the method in bankruptcy is found in Ex parte Boussmaker,[4] where the debt of an alien enemy was offered for proof. As war only suspends the remedy, the proof was admitted; but the dividend was reserved until peace should be made.

§ 211. **Debt barred by Time before the Bankruptcy, not provable.** — A debt barred by the Statute of Limitations of the country of the bankruptcy, if the bar is complete before the commencement of the proceedings, cannot be proved. This has been doubted by able writers and judges, on the ground that the Statute of Limitations has but a local operation compared with the discharge, and so the creditor may lose the chance of a recovery of his debt in some other forum. The point was first decided in England in Ex parte Dewdney,[5] and is still the law there.[6] It is sustained by a great weight of authority in this country.[7]

[1] Ex parte Thompson, 1 Atk. 125; Ex parte Skip, 2 Ves. Sr. 489; Benfield *v.* Solomons, 9 Ves. 77; Ex parte Gwyn, 2 Dea. & Ch. 12.

[2] Belcher *v.* Vardon, 2 Coll. Ch. 162.

[3] Atlas Bank *v.* Nahant Bank, 3 Met. 581; Re Cork & Yoghal R. R. Co., L. R. 4 Ch. 748.

[4] 13 Ves. 71.

[5] 15 Ves. 479.

[6] Burke *v.* Jones, 2 Ves. & B. 275; Ex parte Roffey, 2 Rose, 245; Ex parte Topping, 4 De G. J. & S. 551; Davies *v.* Edwards, 7 Ex. 22; Re Clendinning, 9 Irish Ch. 284; Middleton *v.* Mucklow, 10 Bing. 401.

[7] Re Cornwall, 9 Blatch. 114, Fed. Cas. No. 3250 (overruling Re Ray, 2 Ben. 53, Fed. Cas. No. 11,589, and Re Shepard, 1 N. B. R. 439, Fed. Cas. No.

The point is of no particular importance under our State insolvent laws, because the discharge of the insolvent only affects residents of the same State with the bankrupt, and there is no great hardship in depriving them of a possible recourse to a forum foreign to both parties.

§ 212. **Statute of Limitations not affected by Bankruptcy.** — Neither the schedule of the debtor containing the name of the creditor, nor the payment of a dividend, will affect the running of the Statute of Limitations, because it is not a new promise; nor has the bankrupt, when admitting his bankruptcy, the right to bind his creditors by such a promise. *A fortiori* the proof of a debt against one partner, or a principal, and payment of a dividend thereon, will not take the case out of the statute as against his co-partners or sureties. There are early cases which maintain the opposite of both these propositions, but they have long since been overruled.[1] At any time before petition filed the bankrupt may renew the promise.[2]

§ 213. **When Quasi Partner, etc., may be estopped to prove.** — Where one is a creditor of the bankrupt in fact, but has held himself out as his partner, he is estopped from proving in competition with the joint creditors.[3]

But such holding out must be general. If he has only been represented to be a partner to certain creditors, they may have an action in some form against him, but he retains all the rights of a creditor in the bankruptcy.[4]

12,753; Re Kingsley, 1 Lowell, 216, Fed. Cas. No. 7819; Re Hardin, 1 N. B. R. 395, Fed. Cas. No. 6048; Capelle *v.* Trinity Church, 11 N. B. R. 536, Fed. Cas. No. 2392; Re Noesen, 12 N. B. R. 422, Fed. Cas. No. 10,288; Re Reed, 6 Biss. 250, Fed. Cas. No. 11,635.

[1] Courtenay *v.* Williams, 3 Hare, 539; Davies *v.* Edwards, 7 Ex. 22; Christy *v.* Flemington, 10 Penn. St. 129; Roscoe *v.* Hale, 7 Gray, 274; Stoddard *v.* Doane, ib. 387; Re Ray, 2 Ben. 53, Fed. Cas. No. 11,589; Richardson *v.* Thomas, 13 Gray, 381; Re Kingsley, 1 Lowell, 216, Fed. Cas. No. 7819; Avery's Case, 6 Abb. Pr. R. 144; Bank *v.* Swazey, 47 N. H. 154; Roosevelt *v.* Mark, 6 Johns. Ch. 266; Pickett *v.* Leonard, 34 N. Y. 175; Brandram *v.* Wharton, 1 B. & A. 463; Ex parte Topping, 4 De G. J. & S. 551; Marienthal *v.* Mosler, 16 Ohio St. 566; Georgia Ins. Co. *v.* Ellicott, Taney, 130, Fed. Cas. No. 5354; Jewett *v.* Petit, 4 Mich. 508; Chambers *v.* Whitney, 17 Neb. 70; Bowker *v.* Harris, 30 Vt. 424; Benton *v.* Holland, 33 Albany L. J. 383; *contra*, Letson *v.* Kenyon, 31 Kan. 301.

[2] Re Lane, 23 Q. B. D. 74, if the debt is justly and morally due.

[3] See Ex parte Sheen, 6 Ch. D. 235.

[4] Ex parte Sheen, 6 Ch. D. 235.

So money lent to the bankrupt for the purpose of his business is a provable debt, in the absence of a general representation upon which creditors have a right to rely that it should be postponed to the trade debts, or of some statute making him a partner *quoad hoc*.

This distinction between money lent for the trade simply and a binding estoppel, was disregarded, in a late case, by the very able and learned chief judge in England, who held that a wife who had lent her separate property to her husband for such purposes could not prove for the amount.[1] This decision has been adopted by statute.[2]

§ 214. **Debt made or increased in Contemplation of Bankruptcy.** — If a debt is contracted payable only in case of bankruptcy it cannot be proved, because the condition is illegal, for obvious reasons;[3] but a covenant to repay, upon the happening of that event, money derived from the bankrupt's wife will be good, to the extent of the money actually received from that source.[4] Any contrivance in the form of a debt to obtain an advantage in dividends will be void, at least to the extent of the advantage.[5] So where, on the eve of failure, a joint note of partners is exchanged for a several note of one, or *vice versa*, with a view to the larger dividend which is expected from the joint or the separate estate, it will be rejected;[6] and where acceptances were made to a friend, and by him sold at an enormous discount immediately before the acceptor's bankruptcy, the court, though unable to define the precise fraud, decided that the transaction was fraudulent, and admitted proof only for the money paid for the discount or purchase.[7] In the

[1] Ex parte Grainger, 24 L. T. N. S. 334.

[2] 45 & 46 Vict., c. 75, § 3. See Re Clark (1898), 2 Q. B. 330.

[3] Ex parte Bennett, Cooke (7th ed.), 240; Ex parte Hill, ib. 238; Re Wise, Cas. temp. King, 46; Re Murphy, 1 Sch. & Lef. 44; Re Henecy, ib. 46 (cited); Higginson *v.* Kelly, 1 Ball & B. 252; Ex parte Elder, 2 Mad. 282; Higinbotham *v.* Holme, 19 Ves. 88.

[4] Lockyer *v.* Savage, 2 Str. 947; Ex parte Cooke, 8 Ves. 353; Re Meaghan, 1 Sch. & Lef. 179.

[5] See Whitmore *v.* Mason, 2 J. & H. 204; Holroyd *v.* Gwynne, 2 Taunt. 176; Hawthorn *v.* Newcastle Ry., 3 Q. B. 734; Ex parte Williams, 7 Ch. D. 138; Ex parte Jay, 14 Ch. D. 19.

[6] Phillips *v.* Ames, 5 Allen, 183; Re Lane, 10 N. B. R. 135, Fed. Cas. No. 8044; Neilbut *v.* Nevill, L. R. 5 C. P. 478.

[7] Re Gomersall, 1 Ch. D. 137.

appellate court it was said that the fraud was an attempted manufacture of a large debt for purposes of proof, and that perhaps it should have been wholly rejected.[1]

But it is not a fraud for a debtor expecting to be bankrupt to renew his promise to pay a just debt which both he and the creditor had always treated as binding, but against which the statute had run.[2]

§ 215. **Preferred Creditor.** — Another defence peculiar to bankruptcy is that the creditor has received, as to some part of the indebtedness, a payment or security by way of illegal preference. The equity due to creditors requires that he should surrender this advantage before sharing in the assets.[3] The rule applies to an advantage obtained abroad by legal diligence after the date at which the assignees' title accrued at home, provided the property levied on would or might have come to the assignees if the creditor had not interfered;[4] but not if by reason of the foreign law, or otherwise, the assignees could not possibly have reached it.[5]

In practice, the creditor was often permitted in disputed cases to prove his debt, the court ordering him to give security to the assignees, or permitting them to retain his dividends until the question of preference could be decided in a direct litigation between them.[6]

As a preference was originally a fraud only on the debtor's part, and was voidable by the assignees, though the creditor was not only not a party to a fraud, but was wholly ignorant of the debtor's insolvency, it followed that if the preference was given up voluntarily, or was avoided by the assignees,

[1] s. c. *nom.* Jones *v.* Gordon, 2 App. Cas. 616.

[2] Re Lane, 23 Q. B. D. 74.

[3] Ex parte De Tasted, 1 Rose, 324; Ex parte Greenwood, Buck, 323; Ex parte Barclay, 1 Gl. & J. 272; Ex parte Ackroyd, ib. 391; Act of 1898, § 57 g, *infra*, § 520.

[4] Westlake, 3d ed., p. 157; Cockerell *v.* Dickens, 3 Moore P. C. 98; Selkrig *v.* Davis, 2 Rose, 291, 318, per *Ld. Eldon*; Phillips *v.* Hunter, 2 H. Bl. 402, per *Eyre, C. J.*; Re Oriental Co., L. R. 9 Ch. 557; Ex parte Wilson, L. R. 7 Ch. 490; Re Bugbee, 9 N. B. R. 258, Fed. Cas. No. 2115.

[5] Ex parte Egyptian & C. Co. L. R. 4 Ch. 125; Brickwood *v.* Miller, 3 Mer. 279; Re Bugbee, 9 N. B. R. 258, Fed. Cas. No. 2115.

[6] Mann *v.* Shepherd, 6 T. R. 79; Garratt *v.* Biddulph, 4 Esp. 104; Ex parte Allen, 3 De G. & J. 447.

the creditor came in with the other general creditors for his whole debt, including that which had been attempted to be preferred. This would probably still be the law of the United States, independently of statute, for though an illegal preference includes in its definition the creditor's knowledge of the intended fraud, it is a fraud of a conventional character, and only operative if the bankruptcy takes place within a short time.[1]

Most of our statutes deal with the question. The late law permitted a preferred creditor to prove his debt, if he would surrender his advantage and repay the money or reconvey the property to the assignees without coercion, but not after a judgment or decree had been pronounced against him in a suit by the assignees.[2] This has been adopted in several State laws. In Massachusetts no perferred creditor can prove his debt, whether he surrenders his preference or it is recovered from him by the assignees;[3] but an attempted preference may be rescinded before bankruptcy.[4] These statutes narrow somewhat the law of bankruptcy, at least in appearance, because they speak only of the preferred debt, and do not prevent the proof of a wholly separate debt of the same creditor.[5] But the courts would, undoubtedly, have power to permit the assignees to retain the dividends due to a preferred creditor on a distinct debt, if necessary for their security in recovering and realizing the preference, as in the English practice above referred to.[6]

[1] See Re Tonkin, 4 N. B. R. 52, per *Longyear, J.*, Fed. Cas. No. 14,094.

[2] The statute was somewhat ambiguous, but this was the construction. Re Davidson, 3 N. B. R. 418, Fed. Cas. No. 3599; Re Montgomery, 3 N. B. R. 374, Fed. Cas. No. 9728; Re Reece, 2 Bond, 359, Fed. Cas. No. 11,633; Re Tonkin, 4 N. B. R. 52, Fed. Cas. No. 14,094; Re Richter, 1 Dill. 544, Fed. Cas. No. 11,803; Coxe *v.* Hale, 10 Blatch. 56, Fed. Cas. No. 3310; Re Stephens, 3 Biss. 187, Fed. Cas. No. 13,365; Zahm *v.* Frye, 9 N. B. R. 546, Fed. Cas. No. 18,198; Re Leland, 9 N. B. R. 209, Fed. Cas. No. 8230; Re Jordan, 9 N. B. R. 416, Fed. Cas. No. 7529; Re Forsyth, 7 N. B. R. 174, Fed. Cas. No. 4948; Burr *v.* Hopkins, 12 N. B. R. 211, Fed. Cas. No. 2192; Re Cramer, 13 N. B. R. 225, Fed. Cas. No. 3345.

[3] Pub. Stats., c. 157, § 33.

[4] Blodgett *v.* Hildreth, 11 Cush. 311, per *Bigelow, J.*

[5] Re Arnold, 2 N. B. R. 160, Fed. Cas. No. 551; Re Richter, 1 Dillon, 544, Fed. Cas. No. 11,803; Re Holland, 8 N. B. R. 190, Fed. Cas. No. 6604; Re Comstock, 12 N. B. R. 110, Fed. Cas. No. 3079.

[6] See § 215.

§ 216. **Proof is Submission to Jurisdiction.** — Though proof is not payment, it is an election to submit the debt proved to the jurisdiction of the court of bankruptcy. Therefore, if a creditor residing abroad proves a debt, the court of bankruptcy may restrain his action abroad on the same debt, or may, on petition, after the proof has been made, require him to account for security given for it, which he has not surrendered or credited; and may deal with the proof and the dividends as if the person of the creditor were within the jurisdiction.[1] So the proof will bind him to the discharge duly obtained.

When the law permitted a creditor to pursue his action at law, notwithstanding the bankruptcy as an alternative remedy, the court would restrain a creditor who had proved a debt from the prosecution of an action upon it.[2]

§ 217. **When Creditor may withdraw or amend Proof.** — The courts are now very liberal in permitting a proof to be withdrawn when the creditor finds that he has unintentionally waived some security or set-off or other advantage legitimately his. Whether the mistake was one of law or of fact, and whether it was from inadvertence, is not important.[3]

Formerly the rule was more strict, because a creditor had much greater power than he now has to embarrass the proceedings in bankruptcy by vexatious litigation, and the Chancellor could not interfere with actions at law unless the debt had been proved. The withdrawal meant a renewal of trouble to all persons interested in the bankruptcy.[4] The object is

[1] Ex parte Robertson, L. R. 20 Eq. 733; Re Schepeler, 4 Ben. 68, Fed. Cas. No. 12,453.

[2] Ex parte Wilson, 1 Atk. 152; Ex parte Ward, ib. 153; Ex parte Hardenberg, 1 Rose, 204; Ex parte Lord, 2 Rose, 421; Ex parte Bernasconi, 2 Gl. & J. 381.

[3] Towle *v.* Bannister, 16 Pick. 255; Morse *v.* Lowell, 7 Met. 152; Re Brand, 3 N. B. R. 324, Fed. Cas. No. 1809; Re Montgomery, 3 N. B. R. 426, Fed. Cas. No. 9730; Re Jaycox, 8 N. B. R. 241, Fed. Cas. No. 7242; Re Clark, 5 N. B. R. 255, Fed. Cas. No. 2806; Re Hubbard, 1 Lowell, 190, Fed. Cas. No. 6813; Re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10,754; Ex parte Williams, L. R. 18 Eq. 373; Re King, 2 Morrell, 119; Nichols *v.* Smith, 143 Mass. 455; Bemis *v.* Smith, 10 Met. 194; Ex parte Adamson, 8 Ch. D. 807; Re Baxter, 12 Fed. Rep. 72; Re Farmers' Bank, 13 Fed. Rep. 361; Re Clarke, 67 L. T. 232; Re Piers (1898), 1 Q. B. 627.

[4] Ex parte Eggington, Mont. 72; Ex parte Solomon, 1 Gl. & J. 25; Ex parte Spicer, 12 L. T. N. S. 55.

now attained in a more regular way by prohibiting vexatious suits[1]

Such a petition is refused when some equitable ground is shown against it, by a change in the situation, as where a garnishee process has been discharged by the proof, and the garnishee has paid over the funds to the assignees; or where the proving creditor has taken an active part in the proceedings so as to affect by his vote the choice of assignees or the discharge of the bankrupt, or where he desires to make use of some inequitable power.[2] But merely voting for assignee will not have this effect.[3]

The general practice of permitting a withdrawal is so well established, that courts of law have several times taken for granted that the permission in a given case was a mere form, and have proceeded as if it had been obtained.[4]

§ 218. **Expunging, reducing, and amending Proofs.** — Debts are usually proved *ex parte*, and this is much the more convenient method. It results from this practice that creditors or other persons interested may move to diminish or expunge proofs. There is no limit of time within which such a motion must be made. It has often happened that a defect in a debt is discovered after a dividend has been paid; and the court has power, in such case, to order it to be refunded. As in withdrawing, so in amending proofs, the proving creditor is permitted to change from joint to separate and the reverse, or to amend; terms will, of course, be imposed, such as refunding dividends.[5]

But a great lapse of time, especially if there may have been

[1] Robson, 7th ed., p. 382; Act of 1867, § 21; 14 Stat. 526; R. S. § 5106.

[2] See Hooker *v.* Olmstead, 6 Pick. 481; N. Bedf. Inst. *v.* Fairhaven Bank, 9 Allen, 175; Couldery *v.* Bartrum, 19 Ch. D. 394; Ex parte Solomon, 1 Gl. & J. 25; Stewart *v.* Isidor, 1 N. B. R. 485; Re Bloss, 4 N. B. R. 147, Fed. Cas. No. 1562.

[3] Re Schofield, 12 Ch. D. 337, per *James, L. J.*, p. 345; Franklin County Bank *v.* Greenfield Bank, 138 Mass. 515.

[4] See Bemis *v.* Smith, 10 Met. 194.

[5] Ex parte Capot, 1 Atk. 218; Ex parte Bolton, 2 Rose, 389; Ex parte Morris, 16 N. B. R. 572, Fed. Cas. No. 9823; Re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10,754; Re Baxter, 12 Fed Rep. 72.

loss of evidence, or if dividends have been paid long before, will authorize the court to refuse to expunge.[1]

A debt which has been rejected cannot be proved excepting in the ordinary way of appeal, of which a striking example is found in Phosphate Co. *v.* Molleson,[2] already mentioned.

But when a remedial statute was passed admitting a new class of debts, one of this class was permitted to be proved, though it had once been disallowed.[3] And the court would review a decree upon the discovery of fresh evidence of a character to authorize a new trial.

§ 219. **Waiver of Action by Proof.** — Some statutes have provided that the proof should be, of itself, a waiver of all actions, and a surrender of all judgments in respect to the debt proved. These statutes had a meaning in England, because the law there gave a remedy for all proved debts much like a judgment, and even authorized the courts of bankruptcy, if the discharge was refused, to issue execution upon them as if they were judgments; and the assignees had a right to take all the after-acquired property of the bankrupt excepting wages up to the time of his discharge. These remedies took the place of ordinary judgments and executions, and rendered it unnecessary for the creditors to retain any right of action; because, if the discharge should be granted, it would be valueless, and, if not, these other remedies were as good, or better.

Two of our statutes[4] copied these provisions, which are wholly inapplicable here; because a bankrupt, with us, owns all the property which he acquires after the proceedings are begun, and if he fails to obtain his discharge, the only remedy for the recovery of debts is by ordinary action. Therefore, to prohibit actions by his creditors, after a fair opportunity has been given him to obtain his discharge, and he has neglected to obtain it, or after it has been refused, is to give an undischarged bankrupt all the benefits of a discharge, so far as proved debts are concerned. For these reasons, Congress

[1] Ex parte Bolton, 1 Dea. & Ch. 556.

[2] 4 App. Cas. 801.

[3] Ex parte Lloyd, 17 Ves. 245.

[4] Act of 1841, § 5; 5 Stat. 444; Act of 1867, § 21; 14 Stat. 526; R. S. § 5105. See Batchelder *v.* Batchelder, 20 Atl. Rep. 728 (N. H.).

found occasion to modify the law of 1867, so as to make it clear that the right of action should not be taken away if the discharge were refused.[1]

Proof waives any right the creditor may have to sue in tort, or to reclaim goods procured from him by fraud, if he proves for the price, or to insist that his debt shall not be discharged because the debtor was refused his discharge in an earlier bankruptcy;[2] and, under the act of 1841, the holder of a fiduciary debt was obliged to elect, and if he proved, he lost his immunity from the operation of the discharge.[3]

So proof waives any security or set-off which has not been duly credited.[4]

In all these cases the waiver attaches only to the debt proved, and the creditor retains all his rights in respect to wholly distinct causes of action.[5]

§ 220. "**Claims.**" — A "claim," in bankruptcy, is a written notice filed with the proceedings that the claimant holds some contingent liability or other obligation against the bankrupt which is not yet ripe for proof, but which may become a debt hereafter.[6] The word "claim" is often used, especially in this country, as synonymous with "demand," but its technical meaning is more restricted.

Filing a claim makes it irregular for the assignees to divide the whole property until the claim has been disposed of; but if the creditor cannot, or does not, turn it into a debt before the last dividend is ready to be paid, the assignees may have it expunged, unless, for cause, the court shall see fit to order a sum to be retained to meet it.[7] Under one English statute a

[1] Act of June 22, 1874, § 7; 18 Stat. 179.

[2] Ormsby *v.* Dearborn, 116 Mass. 386; Seavey *v.* Potter, 121 Mass. 297; Fisher *v.* Currier, 7 Met. 424; Gilbert *v.* Hebard, 8 Met. 129.

[3] Chapman *v.* Forsyth, 2 How. 202.

[4] Stammers *v.* Elliott, L. R. 3 Ch. 195; Armstrong *v.* Armstrong, L. R. 12 Eq. 614; Hooker *v.* Olmstead, 6 Pick. 481. [Except when the proof was made inadvertently in England. Re Clarke, 67 L. T. 232; Re Piers (1898), 1 Q. B. 627.]

[5] Ex parte Botterill, 1 Atk. 109; Ex parte Matthews, 3 Atk. 816; Ex parte Crinsoz, 1 Bro. C. C. 270.

[6] Re Haytor Granite Co., L. R. 1 Ch. 77; Ex parte Simpson, 1 Atk. 70; Ex parte Williams, 4 Dea. & Ch. 180; Ex parte Barwis, 6 De G. M. & G. 762. See Act of 1867, § 27; 14 Stat. 529; R. S. § 5092.

[7] See Robson, 7th ed., p. 607.

claim was disregarded unless turned into a debt within six months; in another, the court had discretion to expunge it after six months. In Massachusetts, in administration suits, four years was fixed, which was then the limit for actions against executors.[1] If the estate turns out to be solvent, or if the claim is one which the statute absolutely protects, it is not to be expunged. On the other hand, if the statute peremptorily fixes the limit of delay, it must be expunged when that time has passed.

§ 221. **Mode of Proof.** — Most of the statutes provide that a debt offered for proof shall be drawn out with some formality, and be sworn to and filed.[2]

The oath should be by the creditor himself, unless prevented by absence or illness, and then by his clerk, agent, or attorney.[3] One partner may make proof for all.[4]

In winding up corporations, no formal probate is required, unless called for by the liquidator or the court.[5]

The practice in respect to proofs has always been liberal and free from technicalities. Where strict formal proof would be difficult and expensive, it has often been dispensed with. Thus, a next friend has been permitted to prove on behalf of a married woman against her husband's estate, when, by law, they were one person.[6] At present, in most of the States, she might make her own affidavit; so for a lunatic or person of weak mind, or old and ill.[7]

A bankrupt trustee may prove against his own estate;[8] but the court will, on application, appoint some one to prove.[9] One

[1] Gen. Stats., c. 99, § 6.

[2] Act of 1867, § 22; 14 Stat. 527; R. S. § 5077. Robson, 7th ed., p. 229. For proof under the act of 1898, see *infra*, § 520.

[3] Re Barnes, 1 Lowell, 560, Fed. Cas. No. 1012; Re Jackson, 14 N. B. R. 449, Fed. Cas. No. 7123; Re Whyte, 9 N. B. R. 267, Fed. Cas. No. 17,606.

[4] Ex parte Mitchell, 14 Ves. 597; Ex parte Hodgkinson, 19 Ves. 291.

[5] Lindley, Companies, 5th ed., 713.

[6] Ex parte Wells, 2 M. D. & De G. 504.

[7] Ex parte Maltby, 1 Rose, 387; Ex parte Bucknall, 12 L. J. (Bk.) 42; Ex parte Heald, ib. 87; Ex parte Oxtoby, De G. 453; Ex parte Clarke, 2 Russ. 575.

[8] Orrett *v.* Corser, 21 Beav. 52; Ex parte Colman, 2 Dea. & Ch. 584; Ex parte Collingdon, Mont. & Ch. 156; Ex parte Strettell, ib. 165.

[9] Ex parte Shaw, 1 Gl. & J. 127; Ex parte Vine, 1 Dea. & Ch. 357; Ex parte Shakeshaft, 3 Bro. C. C. 197; Ex parte Moody, 2 Rose, 413.

person has often been permitted to prove for a class of creditors; as a collector for the parish, or one parishioner for all;[1] the admiral, for prize money due to all the officers and men of the fleet.[2]

§ 222. **Creditors may oppose Proof of others.** — Every creditor may contest the proof of every other creditor.[3]

In several of the statutes this right is confined, by implication, to proof in the court of bankruptcy, an appeal being given only to the assignees.[4] But in this, as in many other cases, the practice in bankruptcy authorizes the court to permit a creditor, at his own expense, to carry on proceedings in the name of the assignee, if probable cause be shown.

§ 223. **Proof by Petitioning Creditor.** — A petitioning creditor, at whose suit the adjudication was made, must prove for his debt again, because every creditor has a right to object to the debt of every other creditor.[5] This rule was established when the proceedings were *ex parte;* but it remains sound in all defaulted cases. If the adjudication has been contested, the only reason for requiring a fresh proof is, that the decree, though it establishes the debt, does not find its exact amount, but only that it comes up to the amount required for a valid petition.

§ 224. **Proof of Bills and Notes.** — Bills and notes, and other evidences of debt, are filed in court with the proof in the United States;[6] "exhibited" to the court, in England. They may be taken from the files here by leaving attested copies.

These papers should be produced when dividends are paid, as vouchers, and that the dividends may be indorsed on them.[7]

[1] Ex parte Exleigh, 6 Ves. 811; Ex parte Child, 1 Atk. 111.

[2] Ex parte Russel, 1 Mont. Dig. 115, cited in Eden, Bankruptcy, 2d ed., p. 102. See the case of Portsmouth Bank, cited in Re Rogers, Buck, 490.

[3] Shewen *v.* Vanderhorst, 1 Russ. & M. 347; Owens *v.* Dickenson, Cr. & Ph. 48; Tomlin *v.* Tomlin, 1 Hare, 236; Chapman *v.* Haley, 43 N. H. 300; Farr *v.* Williams, 47 N. H. 560. See Hogan's Est., 181 Pa. St. 500.

[4] Freeland *v.* Mechanics' Bank, 16 Gray, 137. See Coit *v.* Robinson, 19 Wall. 274, at p. 284; Wiswall *v.* Campbell, 93 U. S. 347; Huston *v.* Worthly, 83 Maine, 352.

[5] Ex parte Rawson, Jac. 274.

[6] Re Northern Iron Co., 14 N. B. R. 356, Fed. Cas. No. 10,322.

[7] Ex parte Hossack, Buck, 390; Ex parte Petrie, L. R. 3 Ch. 232; Ex parte Jacobs, L. R. 17 Eq. 575. See *infra*, § 520.

§ 225. **How far the Consideration of Judgments is open to Examination.** — In England, judgments obtained before bankruptcy in actions of contract, and offered for proof, are commonly spoken of as open to contradiction almost like simple contracts.[1] The reason for this practice is, that judgments are often confessed as security for a debt less than their face, or for a fluctuating balance. The reported cases are all those of defaulted actions or confessed judgments, and the true principle is, that judgments should be inquired into only when they were given as security, or when there has been such fraud or error as would authorize a court of law or equity to open the judgment in favor of the defendant, or such collusion or preference as would be a fraud in bankruptcy upon the equality of creditors. This is the American doctrine,[2] and it rests upon the admitted principle, which is probably the actual law of England, that a bankrupt, acting in good faith, and before bankruptcy is contemplated, binds himself and his creditors by all his acts, errors, and neglects.[3] For this reason a judgment obtained for tort is not only provable, but will not be re-examined in bankruptcy.[4] An eminent judge has said: "A judgment is always conclusive when there has been a real fight between the parties." (Per James, L. J., Ex parte Banner, 17 Ch. D. 480, 484.) Of course, if a judgment is given as security, only the true amount of the debt is to be proved.[5]

§ 226. **Whether a Judgment obtained pending the Bankruptcy can be proved.** — The question whether a judgment obtained pending the proceedings in bankruptcy can be proved if the original debt were provable, is one upon which the courts have been much divided.[6] Its most important aspect is in respect

[1] Ex parte Bryant, 1 Ves. & B. 211; Ex parte Marson, 2 Dea. 245; Ex parte Prescott, 1 M. D. & De G. 199; Ex parte Chatteris, 26 L. T. N. S. 174; Ex parte Kibble, L. R. 10 Ch. 373 (and so of awards, Ex parte Butterfill, 1 Rose, 192); Ex parte Anderson, 14 Q. B. D. 606; Re Fraser (1892), 2 Q. B. 633; Re Easton, 10 Morrell, 111; Re Hawkins (1895), 1 Q. B. 404.

[2] Ex parte O'Neil, 1 Lowell, 163, Fed. Cas. No. 10,527; Catlin *v.* Hoffman, 9 N. B. R. 342, Fed. Cas. No. 2521; Fowler *v.* Dillon, 12 N. B. R. 308, Fed. Cas. No. 5000.

[3] Re Lane, 23 Q. B. D. 74.

[4] See § 177.

[5] See § 166.

[6] See Re Pinkel, 1 N. B. N. 138 and cases cited; Re Gallison, 2 Lowell, 72, Fed. Cas. No. 5203.

to the effect upon such a judgment of the debtor's discharge, and it will be treated of under that head.[1] We may say here that most of those courts who permit proof do not admit it as upon a judgment, but as upon a provable debt not merged in a judgment, and therefore do not allow proof for costs excepting when the action has been defended by the assignees, as mentioned in the next section.[2]

§ 227. **Judgment to ascertain Amount.** — If the validity or amount of a provable debt is disputed, an action pending at the time of the bankruptcy may be prosecuted to judgment in order to settle the dispute. If the creditor recovers, his debt and costs may be proved, and execution should be stayed until the question of the defendant's discharge is decided. This practice obtains independently of statutes, and has been expressly adopted by some of them.[3]

The assignee should be summoned in, because he is interested to contest claims upon the estate; and if judgment is rendered against him, it is in his official character only.[4]

[1] *Infra*, § 451; Emery, Appellant, 89 Maine, 544.

[2] See § 187. [Under the act of 1898 costs are allowed up to the time of filing the petition. § 63 a (5), *infra*, § 526.]

[3] See Blossom *v.* Goodwin, 1 Mass. 502; Parsons *v.* Mills, ib. 431; Cotton *v.* Clark, 16 Beav. 134; Bullard *v.* Dame, 7 Pick. 239; Healy *v.* Root, 11 Pick. 389; Hess *v.* Reynolds, 113 U. S. 73, 77, per *Miller, J.*

[4] Norton *v.* Switzer, 93 U. S. 355.

CHAPTER IX.

PRIORITY OF PAYMENT OF DEBTS DUE THE UNITED STATES.

§ 228. **Statute.** — The Revised Statutes (§ 3466) provide: That whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all his debts, those due to the United States shall be first satisfied; and that the priority shall extend not only to cases in which an act of bankruptcy is committed, but also to voluntary assignments by persons unable to pay in full, and to attachments of the estate of an absconding, concealed, or absent debtor. This is, in substance, a re-enactment of the laws of 1797 and 1799.[1] The United States have no priority by prerogative independently of statute.[2]

§ 229. **For what Debts.** — The privilege obtains for all debts in the broad sense of the bankrupt law, legal or equitable, and whether for public moneys, or upon bills of exchange, bonds, contracts, or *quasi* contracts, whether presently payable or not, whether the debtors are citizens or foreigners, and whether the debt was contracted within or without the United States;[3] and whenever an action of debt could be maintained, as for specific penalties; or assumpsit for money illegally borrowed of a public agent.[4] The privilege includes interest to the time of payment.[5]

[1] 1 Stat. 515; ib. 676.

[2] United States *v.* Bank of N. Car., 6 Pet. 29.

[3] United States *v.* Fisher, 2 Cranch, 358; United States *v.* Bank of N. Car., 6 Pet. 29; Harrison *v.* Sterry, 5 Cranch, 289; Howe *v.* Sheppard, 2 Sumner, 133, Fed. Cas. No. 6772.

[4] Bayne *v.* United States, 93 U. S. 642; Re Rosey, 6 Ben. 507, Fed. Cas. No. 12,066; Re Vetterlein, 20 Fed. Rep. 109.

[5] Re Bousfield, 17 N. B. R. 153, Fed. Cas. No. 1704; Re Huddell, 47 Fed. Rep. 206.

§ 230. **Privity.** — Whether money deposited in a bank, or otherwise invested by a public officer, is money of the government, for which there will be a privilege in favor of the United States, or a set-off against them, if the bank becomes insolvent, depends upon whether, by reason of privity of contract, or by virtue of the law of principal and agent, or of fraud, the government could maintain a suit directly for the money. If so, the consequences follow;[1] but if the agent is the only party responsible to the government, and has a right to deal and does deal with the money as his own, he only will be considered the creditor of the banker or depositary, and there will be no privilege in his favor, nor for the government through him.[2]

§ 231. **Meaning of "Insolvent."** — In the case of a living person, being "insolvent," or committing "an act of bankruptcy," are, in this statute, substantially synonymous. "Insolvent," as we have already seen, is a word of many meanings. When the rights of third persons dealing with a debtor may be involved, it is unsafe to make them depend on the actual state of his affairs, not judicially declared, and perhaps not known even to himself. In this connection, therefore, it is held to mean not a mere inability to pay in full, but a technical insolvency or bankruptcy under the law, State or national. When this status has not been adjudged, the United States attaching or seizing property of their debtor, take rank with other creditors according to the time of their attachment, however insolvent in fact the debtor may be.[3] There is no case reported in which the priority has been enforced while the debtor retained the management of his own affairs.[4] If he

[1] Bayne *v.* United States, 93 U. S. 642; Re Chamberlin, 17 N. B. R. 49, Fed. Cas. No. 2580; Re Miller, 17 N. B. R. 402, Fed. Cas. No. 9554.

[2] Comm. *v.* Phœnix Bank, 11 Met. 129; Re Corn Ex. Bank, 7 Biss. 400, Fed. Cas. No. 3242.

[3] United States *v.* King, Wall. Sen. 13, Fed. Cas. No. 15,536; Prince *v.* Bartlett, 9 Mass. 431, affirmed, 8 Cranch, 431; United States *v.* Sheriff of Charleston, Bee, 196, Fed. Cas. No. 16,276; United States *v.* Canal Bank, 3 Story, 79, Fed. Cas. No. 14,715; United States *v.* Marshal of N. Car., 2 Brock. 488, Fed. Cas. No. 15,727; Beaston *v.* Farmers' Bank, 7 Gill & J. 421, affirmed, 12 Pet. 102; Thelusson *v.* Smith, 2 Wheat. 396.

[4] United States *v.* Cochran, 2 Brock. 274, Fed. Cas. No. 14,821.

were technically a bankrupt, as, for example, if he had made a composition under the statute, the priority would arise, although the creditors should permit him to retain possession of his assets. But a mere act of bankruptcy *in pais*, though within the words of the law, can only be ascertained by the adjudication of a competent court.

§ 232. **Assignment.** — The "assignment" is an assignment of the whole property in trust for creditors, and not a mere conveyance of part by way of preference;[1] and the burden is upon the United States to prove that an assignment with or without schedules, which does not, in terms, purport to convey the whole property of the debtor, does so in fact.[2] If partners have made a general assignment of their joint effects, it may be presumed that they are severally insolvent.[3] A colorable or trivial omission of property will not take the assignment out of the law; and if several assignments, though of different dates, are part of one scheme, and together make up a disposition of substantially all the property, they will be sufficient.[4] It is doubted whether a conveyance, even of the whole property, to one or more creditors directly, without a trust, but merely to pay or secure those creditors, will be an assignment within the statute. Such a conveyance would be an act of bankruptcy, when there is a bankrupt law in force; but it would seem that the United States, or some other creditor, must proceed to have the bankruptcy judicially decreed, before the priority can be established.[5]

§ 233. **Corporations.** — The word "person" includes a corporation.[6] It has been said that the winding up of a corporation,

[1] United States *v.* Hooe, 3 Cranch, 73; United States *v.* King, Wall. Sen. 13, Fed. Cas. No. 15,536, more fully stated by the Chief Justice in Downing *v.* Kintzing, 2 S. & R. 326.

[2] United States *v.* Howland, 4 Wheat. 108; United States *v.* Langton, 5 Mason, 280, Fed. Cas. No. 15,560.

[3] United States *v.* Shelton, 1 Brock. 517, Fed. Cas. No. 16,272.

[4] Downing *v.* Kintzing, 2 S. & R. 326; Marshall *v.* Barclay, 1 Paige, 159; United States *v.* Marshal, etc., 2 Brock. 488, Fed. Cas. No. 15,727, per *Marshall, C. J.*; United States *v.* Bank of United States, 8 Rob. (La.) 262; United States *v.* Griswold, 8 Fed. Rep. 496.

[5] Conard *v.* Nicoll, 4 Pet. 291, per *Marshall, C. J.*; United States *v.* McLellan, 3 Sumner, 345, Fed. Cas. No. 15,698; Bouchard *v.* Dias, 1 N. Y. 201 (overruling s. c. 10 Paige, 445).

[6] Rev. Sts. § 1; Beaston *v.* Farmers' Bank, 12 Pet. 102; United States *v.*

through receivers appointed by a court of equity, is not insolvency in this sense.[1] But this must depend on whether the corporation is in fact insolvent. When the debtor has lost the control of his own affairs, whether by death or otherwise, the case has arisen in which the fact of insolvency may be inquired into.

§ 234. **Attachments.** — In accordance with this general course of decision, an "attachment" upon the property of a debtor, though he be absent or absconding, is held not to be within the act, unless it is made under some *quasi* insolvent law, such as existed in several of the States when the statute was originally passed, by which attachments in these cases would lead to a distribution among creditors generally; and further, that an attachment, assignment, or act of insolvency withdrawn or never consummated is as if it had never been.[2]

§ 235. **National Banks.** — National banks are exempted from this general law by virtue of the statute, which prescribes the mode in which their assets shall be distributed, and thus by implication excludes the United States from priority over other creditors.[3]

§ 236. **Appropriation by Debtor.** — The debtor who finds himself insolvent may, of course, pay the United States without being guilty of a preference, and he may lawfully appropriate the payments in a way to exonerate his sureties.[4]

§ 237. **Priority under Bankrupt Laws.** — The late bankrupt law declared that, in making a dividend, all debts due the United States, and all taxes and assessments under the laws thereof, should be paid next after the costs and expenses connected with the bankruptcy;[5] similar provisions are found in

Bank of United States, 8 Rob. (La.) 262. In the case cited next below the Supreme Court of Massachusetts refused to follow the decision in 12 Peters, but it is undoubtedly the law.

[1] Comm. *v.* Phœnix Bank, 11 Met. 129.

[2] Watkins *v.* Otis, 2 Pick. 88; Smith *v.* Tinker, 2 Day, 236; McLean *v.* Rankin, 3 Johns. 369; Beaston *v.* Farmers' Bank, 7 Gill & J. 421, and 12 Pet. 102; Cabot *v.* Haskins, 3 Pick. 83.

[3] Cook County Bank *v.* United States, 107 U. S. 445.

[4] United States *v.* Cochran, 2 Brock. 274, Fed. Cas. No. 14,821.

[5] Act of 1867, § 28; 14 Stat. 530; R. S. § 5701. [The act of 1898 provides that taxes due the United States, State, etc., shall be paid first. § 64 a, *infra*, § 527.]

many of the State laws.[1] Under these laws the remedy is cumulative, and the United States may either prove the debt and exercise the right to examine the bankrupt and the other rights of creditors, or they may require payment from the assignees without formal proof, and enforce the demand by suit, and it is no defence that the assignees have distributed the assets, if they had notice or knowledge of the claim.[1]

In whatever mode the remedy is sought, the assignees are not bound to account for and pay money which they have not received; and the right of the government is subordinate to all proper costs and charges of settling the estate, and to all mortgages, liens, and incumbrances lawfully existing at the date of the bankruptcy,[2] to the allowance made for a widow out of the estate of her insolvent husband,[3] and, by parity of reasoning, to any allowance lawfully made to the bankrupt himself. In Thelusson *v.* Smith[4] a general lien by judgment was held to be overreached by the priority of the United States; but this part of the case was overruled in Conard *v.* Atlantic Insurance Company[5] and other cases cited in the note. A few cases in the State courts[6] which followed the former decision are overruled with it.

[1] Compare Re Webb, 2 N. B. R. 614, Fed. Cas. No. 17,313; Re Rosey, 6 Ben. 507, Fed. Cas. No. 12,066; Re Chamberlin, 17 N. B. R. 49, Fed. Cas. No. 2580; Re Bousfield Mfg. Co., 17 N. B. R. 153, Fed. Cas. No. 1704; Comm. *v.* Phœnix Bank, 11 Met. 129, in which the debt was proved, with the following cases, in which an action was maintained: United States *v.* Hunter, 5 Mason, 62, Fed. Cas. No. 15,426, and 5 Pet. 173; Lewis *v.* United States, 92 U. S. 618; Bayne *v.* United States, 93 U. S. 642; United States *v.* Backus, 6 McLean, 443, Fed. Cas. No. 14,491; United States *v.* Barnes, 31 Fed. Rep. 705.

[2] United States *v.* Fisher, 2 Cranch, 358; United States *v.* Hooe, 3 Cranch, 73; Conard *v.* Atlantic Ins. Co., 1 Pet. 386; Conard *v.* Nicoll, 4 Pet. 291; Conard *v.* Pac. Ins. Co., 6 Pet. 262; Brent *v.* Bank of Wash., 10 Pet. 596; United States *v.* Hunter, 5 Mason, 229, Fed. Cas. No. 15,427; 5 Pet. 173; United States *v.* Cutts, 1 Sumner, 133, Fed. Cas. No. 14,912; United States *v.* Delaware Ins. Co., 4 Wash. C. C. 418, Fed. Cas. No. 14,942; United States *v.* Mech. Bank, Gilpin, 51, Fed. Cas. No. 15,756; United States *v.* Nicholls, 4 Yeates, 251; Forsyth *v.* Clark, 3 Wend. 637; Otis *v.* Warren, 16 Mass. 53; Jackson *v.* Oddie, 2 Mart. N. s. 555; United States *v.* Hawkins, 4 Mart. N. s. 317; United States *v.* Griswold, 8 Fed. Rep. 496.

[3] Postmaster Gen. *v.* Robbins, 1 Ware, 163, Fed. Cas. No. 11,314.

[4] 2 Wheat. 396.

[5] 1 Pet. 386. See United States *v.* Duncan, 4 McLean, 607, Fed. Cas. No. 15,003.

[6] Willing *v.* Bleeker, 2 S. & R. 221; Wilcocks *v.* Waln, 10 S. & R. 380.

§ 238. **United States not bound by Rules of Distribution.** — The United States are not bound by the rules of distribution in bankruptcy; therefore, if they hold a joint debt against partners, they are to be paid out of the separate, as well as the joint assets;[1] but they may be required to exhaust the joint assets first.[2] If they have securities, or have had money in their hands from which they might have paid themselves, they need not make the application before demanding payment.[1] If the debt is due from a partner individually, the government are not to take precedence over the joint creditors in the distribution of joint assets, because the partners, and, when they are bankrupt, their joint creditors, have a lien upon those assets for the payment of joint debts; and the share of one partner is, in all courts and as against all creditors, only his proportion of the net assets.[3]

§ 239. **Personal Liability of Assignees.** — If the assignees distribute the fund to other creditors without notice or knowledge of the claims of the United States, they will not be personally responsible,[4] for the statute which declares them to be so is to be taken with this necessary qualification; and while no formal notice is necessary,[5] any conduct by the United States which is inconsistent with an enforcement of their priority, and which misleads the assignees, is a waiver.[6] But a simple order of distribution by the court will not save them, unless the United States were a party litigant so as to make the matter *res judicata*.[7] It was once held that the proof of a debt by the government was not a waiver of their right of action against the assignees;[8] but that was under a statute which declared that nothing contained therein should affect the rights of the

[1] Lewis *v.* United States, 92 U. S. 618; Bayne *v.* United States, 93 U. S. 642; Re Vetterlein, 20 Fed. Rep. 109.

[2] United States *v.* Shelton, 1 Brock. 517, Fed. Cas. No. 16,272.

[3] United States *v.* Hack, 8 Pet. 271; United States *v.* Astley, 3 Wash. C. C. 508, Fed. Cas. No. 14,472; United States *v.* Evans, Crabbe, 60, Fed. Cas. No. 15,062; Re Webb, 2 N. B. R. 614, Fed. Cas. No. 17,313; United States *v.* Baulos, 5 Mart. N. s. 567.

[4] United States *v.* Primrose, Gilpin, 58, Fed. Cas. No. 16,091; United States *v.* Murphy, 15 Fed. Rep. 589.

[5] United States *v.* Clark, 1 Paine, 629, Fed. Cas. No. 14,807.

[6] United States *v.* Murphy, 11 Biss. 415.

[7] Field *v.* United States, 9 Pet. 182.

[8] Harrison *v.* Sterry, 5 Cranch, 289.

United States. Marshall, C. J., said the proof would probably have been a waiver but for that clause.

§ 240. **Executor of Assignee, etc.** — The executor or administrator of an assignee should not be sued, because the true course is to have a new assignee appointed;[1] so of the assignee of an assignee;[2] though if the executor or assignee undertook to deal with the assets of the bankrupt estate, he might be held *de son tort;* and if the assignee had become personally liable to the United States, an action may be maintained against his executor.[3]

§ 241. **Surety subrogated.** — The last section upon this subject gives subrogation to any surety upon a bond to the United States, or the executor, administrator, or assignee of such surety, who pays the money due on the bond to the United States, with the right to enforce the priority in his own name.[4] The law of subrogation is liberally construed for sureties, and they are permitted to recover interest and costs, whether the payment is made before or after the insolvency of the principal;[5] and to sue the assignee of the principal, instead of proving their debt, though this point has rather been taken for granted than decided.[6] And though the surety may proceed in his own name, an action by the United States for his benefit has been sustained.[7] The statute applies only to a bankrupt principal; and if the owner of the goods has not given the bond, the surety cannot have a privilege against his estate under the statute.[8] The law is only declaratory of the doctrine of courts of equity; and subrogation has been decreed to sureties and other persons who have paid debts of the bank-

[1] Hall *v.* Cushing, 8 Mass. 521.

[2] Pollock *v.* Pratt, 2 Wash. C. C. 490, Fed. Cas. No. 11,256. That action was by a surety, but the intimation that the United States might have had a better title than the surety is unsound, as we shall presently see.

[3] United States *v.* Dewey, 39 Fed. Rep. 251.

[4] Rev. Sts. § 3468.

[5] Champneys *v.* Lyle, 1 Binney, 327; Mott *v.* Maris, 2 Wash. C. C. 196, Fed. Cas. No. 9880; West *v.* Creditors, 3 La. An. 529; United States *v.* Hunter, 5 Mason, 62, Fed. Cas. No. 15,426; affirmed, 5 Pet. 173; Ex parte Marshall, Re Garway, 1 Atk. 261.

[6] Oliver *v.* Smith, 5 Mass. 183.

[7] Meredith *v.* United States, 13 Pet. 486.

[8] Childs *v.* Shoemaker, 1 Wash. C. C. 494, Fed. Cas. No. 2681.

rupt to the United States, which confessedly did not fall within the statute; as when one had given bond as principal for an owner of goods, at his request, and the owner was bankrupt, or had bought goods in bond duty free, and the bankrupt had failed to pay the duties.[1] And so of sureties *simpliciter*.[2] It was once held that a surety had no priority against the assets of his co-surety for his share of the debt,[3] but the soundness of this decision is doubted.[4]

The surety is not subrogated to the right to hold the debt good against a discharged bankrupt; he must pay the government, and establish his right against the assets.[5]

[1] Enders *v.* Brune, 4 Randolph, 438; Re Kirkland, 14 N. B. R. 139, Fed. Cas. No. 7843; affirmed, 14 N. B. R. 157, Fed. Cas. No. 7844.

[2] Anon., Savile, 30, pl. 72; Rex *v.* Bennett, Wightw. 1.

[3] Bank *v.* Adger, 2 Hill (Ch.), 262.

[4] See Judge Hare's remarks in 1 Lead. Cas. Eq., 4th Am. ed., 91, who says that the decision was based on Copis *v.* Middleton, Turn. & Russ. 224, which is not followed in America. See The Tangier, 2 Lowell, 7, Fed. Cas. No. 13,744. Judge Hare cites Schoolfield *v.* Rudd, 9 B. Mon. 291.

[5] Westcott *v.* Hodges, 5 B. & A. 12; Rex *v.* Bingham, 2 Cr. & J. 130, and 1 C. & M. 862; Reed *v.* Emory, 1 S. & R. 339; Aikin *v.* Dunlap, 16 Johns. 77.

CHAPTER X.

PROMISE TO PAY DEBT DISCHARGED BY BANKRUPTCY.

§ 242. **New Promise formerly valid in England.** — The law of England formerly was that a discharge in bankruptcy was not a release of the cause of action; and, therefore, if the debtor, after the time to which his discharge related, that is to say, after the proceedings in bankruptcy were begun, promised the creditor to pay the debt notwithstanding the discharge, the new promise revived the debt.[1] In case of an absolute release such a new promise would of course be *nudum pactum*.

§ 243. **By Present English Law, New Promise is nudum pactum.** — This state of the law gave opportunity for preferences and frauds, because the new promise might be induced by some forbearance which the creditor might agree to exercise in the bankruptcy; and this is a fact very difficult to prove. Many of the statutes, in view of this danger, provided that any such promise should be void.[2]

Under the act of 1869, which contained no provision avoiding the new promise, the courts have held that it is, nevertheless, without consideration and void.[3] These decisions overrule the earlier cases, without professing to do so, because they make a distinction when there is no substantial difference between the kind of discharge granted by the law of 1869 and that of the former acts. If, however, there is a new and valuable con-

[1] Lewis *v.* Chase, 1 P. Wms. 620; Twiss *v.* Massey, 1 Atk. 67; Ex parte Burton, 1 Atk. 255; Trueman *v.* Fenton, Cowp. 544; Brix *v.* Braham, 1 Bing. 281; Roberts *v.* Morgan, 2 Esp. 736; Birch *v.* Sharland, 1 T. R. 715.

[2] 7 Geo. IV., c. 57, § 61; 12 & 13 Vict., c. 106, § 204; 24 & 25 Vict., c. 134, § 164.

[3] Jones *v.* Phelps, 20 W. R. 92; Heather *v.* Webb, 2 C. P. D. 1; Ex parte Barrow, 18 Ch. D. 464.

sideration, such as an agreement to continue dealing with the bankrupt, the promise will be valid.[1] But some of the statutes are broad enough to defeat even such a renewed contract.[2]

The modern rule is more consistent with principle than the former rule. The technical doctrine that the Statute of Limitations merely prohibited an action to be brought after a certain time is unphilosophical, and the supposed resemblance between the bar of that statute and that by a certificate in bankruptcy is misleading. A discharge in bankruptcy releases the debt for all purposes and in all places which the authority of the bankrupt law can reach, or in which it is respected, and there is no sound reason why within these limits it should not be as effectual as a release by deed.

§ 244. **In America New Promise valid if unequivocal.** — The courts of this country follow the earlier English decisions, and hold that, in the absence of a regulation by the written law, such a promise may be supported by the consideration of the old debt.[3] The promise must be distinct and unequivocal; a mere acknowledgment, whether by paying a part[4] or otherwise, or a general declaration of an intention to pay every one, or the expression of a hope, or even an expectation of that sort,

[1] Jakeman *v.* Cook, 4 Ex. D. 26; Re Aylmer, 1 Manson, 391.

[2] Evans *v.* Williams, 1 Cr. & M. 30; Kidson *v.* Turner, 3 H. & N. 581.

[3] Maxim *v.* Morse, 8 Mass. 127; Shippey *v.* Henderson, 14 Johns. 178; Farmers *v.* Flint, 17 Vt. 508; Earnest *v.* Parke, 4 Rawle, 452; Dearing *v.* Moffitt, 6 Ala. 776; Corliss *v.* Shepherd, 28 Maine, 550; McWillie *v.* Kirkpatrick, 28 Miss. 802; Re Ekings, 4 N. J. L. J. 106 and note; Graham *v.* O'Hern, 24 Hun, 221; McDougall *v.* Page, 55 Vt. 187; Robinson *v.* Larabee, 58 Vt. 652; Murphy *v.* Crawford, 114 Pa. St. 496; Nelson *v.* Stewart, 54 Ala. 115; Underwood *v.* Eastman, 18 N. H. 582; Wiggin *v.* Hodgdon, 63 N. H. 39; Harris *v.* Peck, 1 R. I. 262; Yates *v.* Hollingsworth, 5 H. & J. 216; Horner *v.* Speed, 2 P. & H. 616; Fraley *v.* Kelly, 88 N. C. 227; Dyer *v.* Isham, 4 Ohio Circ. Ct. 429; Lanier *v.* Tolleson, 20 S. C. 57; Moseley *v.* Coldwell, 3 Bax. 208; Lanagin *v.* Nowland, 44 Ark. 84; Knapp *v.* Hoyt, 57 Ia. 591; St. John *v.* Stevenson, 90 Ill. 82; Ross *v.* Jordan, 62 Ga. 298; Craig *v.* Seitz, 63 Mich. 727; Carey *v.* Hess, 112 Ind. 398; Higgins *v.* Dale, 28 Minn. 126; Wislizenus *v.* O'Fallon, 91 Mo. 184; Griel *v.* Solomon, 2 So. Rep. 322 (Ala.); Webster *v.* Le Compte, 74 Md. 249.

[4] Stark *v.* Stinson, 23 N. H. 259; Dyer *v.* Isham, 4 Ohio Cir. Ct. 429; Lawrence *v.* Harrington, 122 N. Y. 408; Wheeler *v.* Simmons, 60 Hun, 404; Jacobs *v.* Carpenter, 161 Mass. 16. "I will repay you when I return from L." Swan *v.* Lullman, 12 Mo. App. 583. See Reith *v.* Lullman, 11 Mo. App. 254.

will not be enough.[1] What will amount to a promise must often depend upon the whole conduct of the parties and the circumstances. The following expressions have been held to warrant a court or jury to find a promise: "I will pay;" "I will settle;" "I will see that you are no loser by me;" "She shall have her pay;" "Mr. S. will take an early opportunity to settle the account;" "I am able and willing to pay;" "Tell your wife I calculate to pay the whole note."[2] A *cognovit* given after discharge in an action pending before, is valid.[3]

The question will be for the jury, unless it depends on the construction of a written paper.[4]

§ 245. **Conditional or Special Promises.** — If the promise is to pay when able, the plaintiff must prove the defendant's ability, and if he proves it, the action is maintained; and so of any other condition.[5] It is said, too, that in these cases there must be evidence that the creditor has accepted the conditional promise;[6] though it would seem that in the absence of dissent

[1] Allen *v.* Ferguson, 18 Wallace, 1; Bartlett *v.* Peck, 5 La. Ann. 669; United Society *v.* Winkley, 7 Gray, 460; Mucklow *v.* St. George, 4 Taunt. 612; Brook *v.* Wood, 13 Price, 667; Roosevelt *v.* Mark, 6 Johns. Ch. 266; Brown *v.* Collier, 8 Humph. 510; Dearing *v.* Moffitt, 6 Ala. 776; Yoxtheimer *v.* Keyser, 11 Pa. St. 364; Stewart *v.* Reckless, 4 Zab. 427; Lynbuy *v.* Weightman, 5 Esp. 198; Randidge *v.* Lyman, 124 Mass. 361; Shockey *v.* Mills, 71 Ind. 288. Payments on a running account may be applied by the creditor in the usual mode, though this will pay some items of debt which have been discharged in bankruptcy, if the creditor was notified and did not know of the proceedings. Hill *v.* Robbins, 22 Mich. 475; Riggs *v.* Roberts, 85 N. C. 151; Shaw *v.* Burney, 86 N. C. 331; Brewer *v.* Boynton, 71 Mich. 254; Meech *v.* Lamon, 103 Ind. 515.

[2] Stillwell *v.* Coope, 4 Denio, 225; Pratt *v.* Russell, 7 Cush. 462; Cook *v.* Shearman, 103 Mass. 21; Lobb *v.* Stanley, 5 Q. B. 574; Evans *v.* Carey, 29 Ala. 99; Harris *v.* Peck, 1 R. I. 262; St. John *v.* Stephenson, 90 Ill. 82. See Williams *v.* Robbins, 32 Maine, 181; Lerow *v.* Wilmarth, 7 Allen, 463.

[3] Sweenie *v.* Sharp, 4 Bing. 37.

[4] Fitzgerald *v.* Alexander, 19 Wend. 402; Pratt *v.* Russell, 7 Cush. 462; Bennett *v.* Everett, 3 R. I. 152; St. John *v.* Stephenson, 19 N. B. R. 227; s. c. 90 Ill. 82.

[5] Besford *v.* Saunders, 2 H. Bl. 116; Campbell *v.* Sewell, 1 Chitty R. 609; Scouton *v.* Eislord, 7 Johns. 36; Kingston *v.* Wharton, 2 S. & R. 208; Sherman *v.* Hobart, 26 Vt. 60; Bank of Mobile *v.* Boykin, 9 Ala. 320; Yates' Admr. *v.* Hollingsworth, 5 Har. & J. 216; Mason *v.* Hughart, 9 B. Mon. 480; Graham *v.* Hunt, 8 B. Mon. 7; Carson *v.* Osborn, 10 B. Mon. 155; La Tourrette *v.* Price, 28 Miss. 702; Randidge *v.* Lyman, 124 Mass. 361; Elwell *v.* Cumner, 136 Mass. 102.

[6] Craig *v.* Brown, 3 Wash. C. C. 503, Fed. Cas. No. 3330; Samuel *v.* Cravens, 10 Ark. (5 Eng.) 380.

his assent should be presumed. Promises to pay a debt in work, to give a note, to allow the amount in set-off, or even to pay by instalments without agreeing on the time for paying them, have been held not to revive the old debt; though such a promise may in some cases authorize an action sounding in damages.[1]

§ 246. **Whether it must be in Writing.** — At common law an oral promise will revive the debt;[2] but there are statutes in some of the States putting such a contract within the protection of the Statute of Frauds.[3] It was held in many of the English cases that the new promise did not revive the right to arrest the person of the debtor on mesne process, under statutes which relieved the debtor's person from any action arising out of, or by reason of, the original debt.[4] Generally speaking all rights to process would revive.

§ 247. **Judgment on New Promise.** — Though the promise should be void by statute, a judgment submitted to upon it will not be set aside, nor a voluntary payment be recoverable;[5] and if a new note or other security is given in part for the old debt and in part for the new, the creditor may recover the amount which represents the new debt.[6]

§ 248. **New Promise revives the Debt for all Purposes.** — It has sometimes been held that the action must be based on the new promise;[7] but the better opinion is that an absolute promise to pay, or a conditional one which has become absolute, revives the debt, and that it may be declared on precisely as if it had never been barred, and the new promise may be replied

[1] Porter *v.* Porter, 31 Maine, 169; Taylor *v.* Nixon, 4 Sneed, 352; Mucklow *v.* St. George, 4 Taunt. 612; Trustees *v.* Gilman, 55 Miss. 148; Bach *v.* Cohn, 3 La. Ann. 101.

[2] Roberts *v.* Morgan, 2 Esp. 736; Barron *v.* Benedict, 44 Vt. 518; Henly *v.* Lanier, 75 N. C. 172.

[3] Spooner *v.* Russell, 30 Maine, 454; Pub. Sts. (Mass.) c. 78, § 3.

[4] Wilson *v.* Kemp, 3 M. & S. 595; Bailey *v.* Dillon, 2 Burr. 736; Couch *v.* Ash, 5 Cow. 265; Hubert *v.* Williams, ib. 537; Ford *v.* Chilton, 2 Bl. 798; Peers *v.* Gadderer, 1 B. & C. 116.

[5] Sweenie *v.* Sharp, 4 Bing. 37; Denne *v.* Knott, 7 M. & W. 143; Philpot *v.* Aslett, 1 C. M. & R. 85.

[6] Evans *v.* Williams, 1 Cromp. & M. 30.

[7] Graham *v.* Hunt, 8 B. Mon. 7; Carson *v.* Osborn, 10 B. Mon. 155; Chabot *v.* Tucker, 39 Cal. 434; Murphy *v.* Crawford, 114 Penn. St. 496; Fraley *v.* Kelly, 88 N. C. 227.

if the bar is pleaded, or may be given in evidence in answer to the discharge if set up otherwise.[1] Any defence excepting the discharge in bankruptcy may be made to the new promise which might have been made to the original claim.[2] If the new promise was conditional, it is said that the reply should set out the condition and its performance; but this seems inconsistent with the authorities cited in the last note. The old debt revived by a new promise shares *pro rata* with new debts in a second bankruptcy though the new debts were contracted in obtaining all the new assets.[3]

§ 249. **New Promise must be after Proceedings are begun.** — The new promise may be made pending the proceedings in bankruptcy, and before as well as after the discharge is obtained;[4] but if before or about that time, the transaction will be open to great suspicion of having been given to influence the proceedings. Indeed, the danger of oppression or collusion has been the motive for those statutes which make all such promises void, and perhaps the policy of those laws is the wiser policy. It was held in one case that a promise before the bankruptcy, that the debt should not be affected by a discharge, could be enforced after the discharge, on the ground that such a contract was collateral to the original debt, and not itself provable;[5] but this judgment has not been followed,[6] and under most modern statutes the premises would not be sound because collateral and contingent liabilities

[1] Maxim *v.* Morse, 8 Mass. 127; Penn *v.* Bennet, 4 Camp. 205; Shippey *v.* Henderson, 14 Johns. 178; McNair *v.* Gilbert, 3 Wend. 344; Earle *v.* Oliver, 2 Ex. 71, per *Parke, B.*; Otis *v.* Gazlin, 31 Maine, 567; Way *v.* Sperry, 6 Cush. 238; Farmers *v.* Flint, 17 Vt. 508; Wakeman *v.* Sherman, 5 Seld. 85; Dusenbury *v.* Hoyt, 53 N. Y. 521; Turner *v.* Chrisman, 20 Ohio, 332.

[2] Earle *v.* Oliver, 2 Ex. 71; Lerow *v.* Wilmarth, 7 Allen, 463.

[3] Re Merriman's Est., 44 Conn. 587.

[4] Roberts *v.* Morgan, 2 Esp. 736; Stilwell *v.* Coope, 4 Denio, 225; Earle *v.* Oliver, 2 Ex. 71; Corliss *v.* Shepherd, 28 Maine, 550; Kirkpatrick *v.* Tattersall, 13 M. & W. 766; Lerow *v.* Wilmarth, 7 Allen, 463; Otis *v.* Gazlin, 31 Maine, 567; Hornthal *v.* McRae, 67 N. C. 21; see article 9 Jur. part II. p. 481, criticising Kirkpatrick *v.* Tattersall, 13 M. & W. 766; Wiggin *v.* Hodgdon, 63 N. H. 39; Lanagin *v.* Nowland, 44 Ark. 84; Knapp *v.* Hoyt, 57 Iowa, 591; s. c. 42 Am. Rep. 59 and note; Graves *v.* McGuire, 79 Ky. 532, *contra*.

[5] Kingston *v.* Wharton, 2 S. & R. 208; Haines *v.* Stauffer, 13 Penn. St. 541.

[6] Reed *v.* Frederick, 8 Gray, 230.

are provable. And it may well be doubted whether such a promise would not be illegal.

§ 250. **Whether New Promise enures to Benefit of Indorsee, etc.** — Closely connected with this question is another, whether such a promise made to the payee or holder of a negotiable instrument will avail a subsequent indorsee suing in his own name. Though the more numerous authorities are perhaps in favor of a negative answer,[1] yet as most of them rest upon the proposition that the action must be upon the new promise, and as that proposition cannot be now considered sound,[2] the better opinion seems to me to be that the old debt and its evidence or obligation are revived for all purposes, and for the benefit of the same persons, as if there had been no discharge.[3] So the authorities are divided on the question whether the promise may be made to any third person for the benefit of the creditor, or only to the creditor himself.[4]

[1] Depuy *v.* Smart, 3 Wend. 135; Moore *v.* Viele, 4 Wend. 420; Walbridge *v.* Harroon, 18 Vt. 448; White *v.* Cushing, 30 Maine, 267; Wardwell *v.* Foster, 31 Maine, 558. See Field's Estate, 2 Rawle, 351.

[2] *Ante*, § 248.

[3] Underwood *v.* Eastman, 18 N. H. 582; Badger *v.* Gilmore, 33 N. H. 361; Way *v.* Sperry, 6 Cush. 238.

[4] On the one side, Depuy *v.* Smart, 3 Wend. 135; Moore *v.* Viele, 4 Wend. 420; Soulden *v.* Van Rensselaer, 9 Wend. 293; Wakeman *v.* Sherman, 5 Seld. 85; on the other, McKinley *v.* O'Keson, 5 Penn. St. 369; Evans *v.* Carey, 29 Ala. 99; Wachter *v.* Albee, 80 Ill. 47; Allen *v.* Collier, 70 Mo. 138; s. c. 35 Am. Rep. 416 and note; Sibert *v.* Wilder, 16 Kan. 176; Katz *v.* Moessinger, 7 Brad. 536. That a new oral promise is barred in five years, see Reith *v.* Lullman, 11 Mo. App. 254.

CHAPTER XI.

SET-OFF AND MUTUAL CREDIT.

§ 251. **Statute of Anne.** — The injustice of requiring one who is both debtor and creditor of a bankrupt to pay the assignees in full and receive only a dividend early shocked, says Lord Mansfield, the natural sense of mankind.[1] Accordingly in the year 1705, by the statute 4 & 5 Anne, c. 17, § 11, set-off was provided for by statute in England, in cases of bankruptcy, many years before any similar law was applied to actions between solvent persons. It was a very liberal statute, and has been followed ever since in all revisions of the bankrupt laws. It contained the important phrase "mutual credit," which covers the whole ground.[2] The latest law in England adds "mutual dealings,"[3] which, however, does not enlarge the already broad scope of the law.[4]

§ 252. **Set-off by Statute between Party and Party.** — The bankrupt law not only first provided for set-off by statute, but likewise first gave the written law an equitable construction. In 1843 an eminent judge declared that set-off at law was established for convenience to prevent cross-actions; and in bankruptcy, to make a final and equitable settlement between the parties really interested, upon terms of substantial justice.[5] The courts have now adopted an equitable practice in ordinary cases, so that in 1849 another eminent judge was able to say, "In all these cases of set-off the law endeavors to meet the

[1] Green *v.* Farmer, 4 Burr. 2214, 2220.

[2] See 1 Christian, Bankruptcy, 2d ed., 238 *et seq.*

[3] 32 & 33 Vict., c. 71, § 39. See B. A. 1883, § 38.

[4] Robson, 7th ed., p. 365. [Sect. 68 of the act of 1898 provides for set-off. It is very similar to the corresponding provision of the act of 1867. See *infra*, § 531.]

[5] Per *Parke, B.*, Forster *v.* Wilson, 12 M. & W. 191, 203.

real honesty and justice of the case."[1] There remains the difference that the settlement in bankruptcy is final, and this in many cases makes that a just and proper set-off which would be unjust or inconvenient between solvent persons, as where the debt on one side is not yet payable, or is contingent or unliquidated; and, on the other hand, the equality due to creditors sometimes prevents a set-off otherwise good, as when a debt is bought after the bankruptcy, or a set-off is agreed for in order to give a preference.

§ 253. **Set-off independent of Statute.** — Courts of equity established a limited practice of set-off in cases of insolvency even before or independently of the statute of Anne.[2] In this country some courts will interfere by injunction to require a set-off in an action pending at law, if the plaintiff is insolvent and there is no adequate remedy by statute.[3] Under the various laws for winding up insolvent corporations or settling the estates of insolvent natural persons, living or dead, a very liberal practice of set-off has obtained, extending to equitable and unliquidated debts, even where the statute has contained no provision at all upon the subject.[4] Thus the "natural

[1] Fish *v.* Kempton, 7 C. B. 687, per *Wilde, J.*

[2] Powel *v.* Stuff, 2 Bulst. 26; Hawkins *v.* Freeman, 2 Eq. Cas. Abr. 10; Vin. Abr. Discount, A, pl. 26; Chapman *v.* Derby, 2 Vern. 117; Anon., 1 Mod. 215; see remarks of the judges in Ex parte Stephens, 11 Ves. 24; Freeman *v.* Lomas, 9 Hare, 109, 112; Gibson *v.* Bell, 1 Bing. N. C. 743, 753; Jones *v.* Mossop, 3 Hare, 568, 572; Boyd *v.* Mangles, 16 M. & W. 337; Bailey *v.* Finch, L. R. 7 Q. B. 34; Vulliamy *v.* Noble, 3 Mer. 593.

[3] Pond *v.* Smith, 4 Conn. 297; Simson *v.* Hart, 14 Johns. 63; Lindsay *v.* Jackson, 2 Paige, 581; Gay *v.* Gay, 10 Paige, 369; Tuscumbia R. R. *v.* Rhodes, 8 Ala. 206; Goldsmith *v.* Stetson, 39 Ala. 183; Ferris *v.* Burton, 1 Vt. 439; Downer *v.* Dana, 17 Vt. 518; Blake *v.* Langdon, 19 Vt. 485; Favorite *v.* Lord, 35 Ill. 142; Raleigh *v.* Raleigh, ib. 512; Dorsey *v.* Reese, 14 B. Mon. 157; Hughes *v.* Trahern, 64 Ill. 48; Hall *v.* Kimball, 77 Ill. 161; Russell *v.* Conway, 11 Cal. 93; Merrill *v.* Souther, 6 Dana, 305; Payne *v.* Loudon, 1 Bibb, 518; Davis *v.* Milburn, 3 Iowa, 163; Lee *v.* Lee, 31 Ga. 26; Field *v.* Oliver, 43 Mo. 200; Hobbs *v.* Duff, 23 Cal. 596; Hamilton *v.* Van Hook, 26 Texas, 302; Thrall *v.* Omaha Hotel, 5 Neb. 295; Farris *v.* Howston, 78 Ala. 250. [See *contra*, Hale *v.* Holmes, 8 Mich. 37; Riddick *v.* Moore, 65 No. Car. 382; Rawson *v.* Samuel, Cr. & P. 172.]

[4] Rose *v.* Hart, 2 Smith L. C., 7th Am. ed., 293, note. See preceding notes 2 and 3. McDonald *v.* Webster, 2 Mass. 498; Bigelow *v.* Folger, 2 Met. 255; Knapp *v.* Lee, 3 Pick. 452; Sewall *v.* Sparrow, 16 Mass. 24; Comm. *v.* Phœnix Bank, 11 Met. 129; Phelps *v.* Rice, 10 Met. 128; Aldrich *v.* Campbell, 4 Gray, 284; McLaren *v.* Pennington, 1 Paige,

sense of mankind" has found expression in later times. Some few judges have thought that equality among the creditors is repugnant to set-off; but the decided weight of opinion is that this equality begins with the bankruptcy or known insolvency of the debtor, and that the right of set-off stands upon similar grounds of universal justice with that of a secured creditor to hold his security.

Courts of law exercise an equitable power of setting off judgments against each other when justice requires it. Recoupment, which is an equitable set-off, depending upon a connection in the origin of the cross demands, has received great extension of late years.[1] There may be set-off by virtue of an agreement which was made when the debt on one side was contracted or forborne, or when an account was adjusted.[2] If incomplete, the agreement may in some cases be revoked by bankruptcy,[3] where the rights of third persons may be prejudiced by enforcing it,[4] and if illegal, as a preference or for any other reason, it will, of course, not be enforced by the courts.[5]

§ 254. **Assignees bound by Ordinary Practice of Set-off.** — Set-off of these various sorts existing by statute or practice may be availed of by a defendant when assignees are plaintiffs, in addition to or instead of that established by the bankrupt

102; Carroll *v.* Weaver, 65 Conn. 76; Wetherell *v.* Bldg. Assn., 153 Ill. 361; Medomak Bank *v.* Curtis, 24 Maine, 36; Morrison *v.* Jewell, 34 Maine, 146; Ellis *v.* Smith, 38 Maine, 114; Clarke *v.* Hawkins, 5 R. I. 219; Receivers *v.* Paterson Gas L. Co., 3 Zab. 283; Ross *v.* McKinny, 2 Rawle, 227; Beaver *v.* Beaver, 23 Penn. St. 167; Boissier *v.* Belair, 1 Mart. (La.) N. S. 481; Kenner *v.* Sims, 6 Mart. (La.) N. S. 66; Tuscumbia R. R. *v.* Rhodes, 8 Ala. 206; Betts *v.* Gunn, 31 Ala. 219; Keightley *v.* Walls, 27 Ind. 384.

[1] Sedgwick, Damages, tit. Recoupment.

[2] Dobson *v.* Lockhart, 5 T. R. 133; Kinnerley *v.* Hossack, 2 Taunt. 170; Owens *v.* Denton, 1 C. M. & R. 711; Roper *v.* Bumford, 3 Taunt. 76; Vulliamy *v.* Noble, 3 Mer. 593; Freeman *v.* Lomas, 9 Hare, 109, per *Turner, V. C.*; Habershon's Case, L. R. 5 Eq. 286; Ward *v.* Winship, 12 Mass. 481; Mays *v.* Mays, 7 Watts, 561; Mitchell *v.* Sellman, 5 Md. 376; Sparhawk *v.* Drexel, 12 N. B. R. 450, Fed. Cas. No. 13,204; Lincoln *v.* Hinzey, 51 Ill. 435.

[3] Williams *v.* Brimhall, 13 Gray, 462; Barge's Case, L. R. 5 Eq. 420; Black & Co.'s Case, L. R. 8 Ch. 254; Ex parte Hodgkin, L. R. 20 Eq. 746.

[4] Parker *v.* Smith, 16 East, 382; Wiltshire Iron Co. *v.* Great W. Ry. Co., L. R. 6 Q. B. 101.

[5] Forsyth *v.* Woods, 11 Wall. 484.

law itself, unless when some principle of that law will be violated.[1] If the assignees are not parties to an action, though they may have some interest in it, or are parties jointly with solvent persons, the law of set-off as between solvent parties is the only one which can be availed of, and that of bankruptcy, in so far as it is peculiar, cannot be invoked.[2] So where the debtor makes his own assignment, the ordinary law of set-off, and not the more liberal rules in bankruptcy, will apply.

§ 255. **Mutual Credit.** — Bankrupt laws usually contain a provision substantially like that of the early statutes, that when there have been mutual debts or mutual credits between the bankrupt and any other person, a balance shall be struck, and that only shall be recovered or proved. Mr. Justice Story and other jurists have used the phrase "mutual credit" as meaning, in equity, a credit agreed upon between the parties, or arising out of connected transactions.[3] These decisions and remarks have been sometimes cited by learned judges sitting in bankruptcy. But the phrase was first used in bankruptcy, and in that connection has a much more extensive meaning. It was early decided in England that it was of no consequence that the parties had not knowingly trusted each other,[4] and the cases, especially those on negotiable notes, are wholly inconsistent with any such narrow definition; nor is there a single case under any bankrupt law which supports it. Mutual credit, in the bankrupt law, means that the parties are, or in the natural course of events will be, creditors of each other. Lord Hardwicke was reported in Ex parte Deeze[5] to have extended the rule to a case in which the bankrupt's property was in the hands of his creditor for any purpose, as, for instance, to be packed. This supposed decision was challenged, and the same

[1] Ridout *v.* Brough, Cowp. 133; Lock *v.* Bennet, 2 Atk. 48; Thornton *v.* Maynard, L. R. 10 C. P. 695, per *Coleridge, C. J.*; Chase *v.* Petroleum Bank, 66 Penn. St. 169.

[2] Staniforth *v.* Fellowes, 1 Marsh. 184; New Quebrada Co. *v.* Carr, L. R. 4 C. P. 651; Turner *v.* Thomas, L. R. 6 C. P. 610.

[3] 2 Story Eq., 13th ed., § 1435; Greene *v.* Darling, 5 Mason, 201, Fed. Cas. No. 5765.

[4] Hankey *v.* Smith, 3 T. R. 507; Munger *v.* Albany Bank, 85 N. Y. 580, *contra*.

[5] 1 Atk. 228.

eminent judge afterwards declared that the report was incorrect, and that the case was decided upon evidence of a custom that packers should have a lien for their general balance;[1] he accordingly decided that a miller had no such set-off unless he could prove a similar custom.[1] The Court of King's Bench followed the later decision.[2] Notwithstanding these corrections, the unreliable report of Ex parte Deeze was cited for forty years, and led to at least one decision which was not satisfactory to the profession.[3]

§ 256. **Rose v. Hart.** — In 1818 the Court of Common Pleas carefully reviewed the subject, and in the leading case of Rose *v.* Hart[4] laid down the rule that credit means not only a present debt, but also a course of dealing which will result in one, such as the possession by the person claiming the set-off of chattels or choses in action, with power to sell or to collect them; but that a mere deposit, whether for safe keeping or for a particular purpose, which would never give rise to the relation of debtor and creditor between the parties, was not within the statute. This case has been followed to this time with one slight modification, or rather explanation.

In 1836 a most elaborate judgment was given in the judicial committee by Lord Brougham, in Young *v.* Bank of Bengal,[5] in which he argued that a bailee could only set off a debt of the bankrupt bailor where the deposit must necessarily terminate in a debt, or where he had an irrevocable power to convert it. The actual decision was that bankers with whom government bills were deposited as security for an advance,

[1] Ex parte Ockenden, 1 Atk. 235. Mr. Eden thinks this explanation was an afterthought, Eden, Bankruptcy, 2d ed., 190; Lord Brougham proved from Lord Hardwicke's original minute-book that there was evidence of such a custom; Young *v.* Bank of Bengal, 1 Deacon, 622, 684, note (*c*); and it has lately been decided that the custom was established by that case, and is still the law of England in the absence of evidence of a change of usage. Ex parte Shubrook, 2 Ch. D. 489.

[2] Green *v.* Farmer, 4 Burr. 2214; Wilkins *v.* Carmichael, Doug. 101.

[3] Olive *v.* Smith, 5 Taunt. 56. See Eden, Bankruptcy, 2d ed., 193; Sampson *v.* Burton, 2 Brod. & B. 89; Alsager *v.* Currie, 12 M. & W. 751, 755, per *Parke, B.*; Buchanan *v.* Findlay, 9 B. & C. 738, 744, per *Campbell*, arg.

[4] 8 Taunt. 499.

[5] 1 Moore P. C. 150; 1 Deacon, 622.

with power to sell only after default, and no default had happened at the time of the bankruptcy, could not set off their general balance against the surplus. Baron Parke, who sat in the case, explained afterwards that it was decided upon two reasons: that the deposit was for a particular purpose, and that the assignees were bound to redeem before default.[1] The latter is the true reason: the right to sell the bills, and, therefore, to convert the surplus into a debt, did not arise in the time of the bankrupt, and the credit could not be created by the neglect of the assignees to redeem at once. In technical language there was no mutuality. That this is the scope of the decision is shown by two later cases. In Naoroji *v.* Bank of India,[2] a mere agency to collect bills was held to establish a case of mutual credit; and in Astley *v.* Gurney,[3] a pledge of goods and acceptances for a particular debt, but accompanied with a present right to sell, had a similar effect, though the power was not fully exercised until after the bankruptcy, and though enough had been realized before to pay the particular debt. The statement in Rose *v.* Hart, therefore, remains untouched, excepting when the power to sell depends upon a contingency which has not happened at the date of the bankruptcy.[4] These decisions have been followed in the United States, and the law in this country is that one who has the goods or effects of the bankrupt, with a present right to convert them into money, has been given credit by the bankrupt, and may, therefore, set off against the proceeds of the goods or choses in action a debt which he owes the bankrupt.[5]

§ 257. **French v. Fenn; Easum v. Cato.** — Two early cases will illustrate this part of the subject. In French *v.* Fenn,[6]

[1] Per *Parke, B.*, Alsager *v.* Currie, 12 M. & W. 751.

[2] L. R. 3 C. P. 452.

[3] L. R. 4 C. P. 714.

[4] 2 Smith Lead. Cases, *sub nom.* Rose *v.* Hart; and see Atkinson *v.* Elliott, 7 T. R. 378; Bittleston *v.* Timmis, 1 C. B. 389; Chalmers *v.* Page, 3 B. & Ald. 697, and cases cited in the following sections. Re Rose, 1 Manson, 218; Palmer *v.* Day 895), 2 Q. B. 618.

[5] Murray *v.* Riggs, 15 Johns. 571; Bemis *v.* Smith, 10 Met. 194; Ex parte Whiting, 2 Lowell, 472, Fed. Cas. No. 17,573; Re Farnsworth, 5 Biss. 223, Fed. Cas. No. 4673; Goodrich *v.* Dobson, 43 Conn. 576, per *Shipman, J.*, as referee.

[6] 2 Doug. 257.

the defendant owned a string of pearls, and duly transferred to the bankrupt one-third of the profits to arise from the sale of them; after the bankruptcy the defendant sold the pearls, and in an action by the assignees for the bankrupt's share of the profits, the defendant was permitted to set off a debt due him from the bankrupt not connected with the joint dealing. Here was no lien by contract, nor one by custom or general law, and there was no debt on one side at the time of the bankruptcy. In Easum *v.* Cato,[1] the defendant Cato had authorized the bankrupt to ship goods in his name, and had written to the foreign merchants to insure, etc. The proceeds having come to the defendant's hands, and the assignees having brought suit for them, he was allowed to set off his general balance, as well as the charges of the particular adventure. There was no lien existing at the time of the bankruptcy; the jury had found one, but the court left it out of the case.

§ 258. **Banker and Customer.** — Though bankers are bound to honor their customer's checks to the extent of his cash balance, without regard to his liability on running bills or notes, yet as soon as he becomes bankrupt there is a lien or right of set-off for those liabilities, whether they have matured or not.[2] This is the law for another reason, that the right being reciprocal, if the banker becomes bankrupt, the payment of checks is stopped, and the customer is entitled to the set-off.[3]

§ 259. **Lien, Pledge, Set-off.** — In many of the cases above referred to the law of mutual credit in bankruptcy may be said to create a lien which did not before exist, or to make irrevo-

[1] 5 B. & A. 861.

[2] Jourdaine *v.* Lefevre, 1 Esp. 67; Alsager *v.* Currie, 12 M. & W. 751; Demmon *v.* Boylston Bank, 5 Cush. 194; Scammon *v.* Kimball, 92 U. S. 362; Re Petrie, 7 N. B. R. 332, Fed. Cas. No. 11,040; Blair *v.* Allen, 3 Dillon, 101, Fed. Cas. No. 1483; Sparhawk *v.* Drexel, 12 N. B. R. 450, Fed. Cas. No. 13,204; Clark *v.* Northampton Bank, 160 Mass. 26; Kentucky Co. *v.* Merch. Bank, 90 Ky. 225. A court of law, in the exercise of its equitable powers, will stay an action to give an opportunity for the set-off where the customer is insolvent. Alliance Bank *v.* Holford, 16 C. B. N. S. 460. In Traders' Bank *v.* Campbell, 14 Wall. 87, this right was lost by the act of the defendants, who, instead of relying on the set-off, caused the deposit, with other property, to be seized on a judgment which was a preference.

[3] Winslow *v.* Bliss, 3 Lans. 220; Platt *v.* Bentley, 20 Am. Law Reg. 171; Jones *v.* Piening, 85 Wis. 264.

cable a power of sale which the bankrupt, while solvent, could have recalled. But, as Mr. Christian observes,[1] it is immaterial whether we call it mutual debt, mutual credit, lien, or pledge, so long as it has all the effect of a general lien.

§ 260. **Bills and Notes.** — If A takes a bill or note, he gives credit to all the antecedent parties to it; if he lends his name on such paper, he gives credit to the person accommodated; and if any of these persons becomes bankrupt, being a creditor of A, the credit is mutual; and A, taking up the paper before or after the bankruptcy, may set the amount against his debt to the bankrupt.[2]

Where bankers discounted a bill accepted by the defendant, and afterwards negotiated it and became bankrupt, and the holder paid himself out of the funds of the bankers, and returned the bill to their assignees, the defendant was permitted to set his deposit with the bankrupt against the amount of the bill, because the credit, though suspended while the bill was in the hands of a third person, was revived when the assignees received it again.[3] Knowledge on the debtor's part that the creditor is his creditor is not material;[4] but it is held that one who indorses or guarantees the payment of a debt of the bankrupt without his privity, and without being an owner of the paper, but entering into a merely collateral undertaking, has not given credit to the bankrupt, and cannot set off the debt if paid after the debtor's bankruptcy.[5]

[1] 1 Christian, Bankruptcy, 2d ed., 513; approved, Eden, Bankruptcy, 2d ed., 189.

[2] Smith *v.* Hodson, 4 T. R. 211; Ex parte Boyle, Cooke, 7th ed., 542; Houle *v.* Baxter, 3 East, 177; Ex parte Wagstaff, 13 Ves. 65; Bittleston *v.* Timmis, 1 C. B. 389; Collins *v.* Jones, 10 B. & C. 777; Barrett's Case, 4 De G. J. & S. 756; McKinnon *v.* Armstrong, 2 App. Cas. 531; Hulme *v.* Muggleston, 3 M. & W. 30; Russell *v.* Bell, 8 M. & W. 277; Alsager *v.* Currie, 12 M. & W. 751; Robinson *v.* Howes, 20 N. Y. 84.

[3] Bolland *v.* Nash, 8 B. & C. 105. See a criticism on this decision, 1 Griffith & Holmes B. L. 616, but the case seems well decided. See Ex parte Staddon, 3 M. D. & De G. 256.

[4] See *supra*, § 255, note 2, and per *Knight Bruce*, arg.; Clark *v.* Cort, Cr. & Ph. 154.

[5] See Nelson *v.* Harrington, 16 Gray, 139. By the law of Massachusetts a contingent debt, arising by guaranty, could not be proved, so that the claim could not be set off as a mutual debt.

§ 261. **No Credit by Fraud, Mistake, or Breach of Duty.** — One party cannot set off a debt which has arisen by his fraud, or breach of trust, or even by accident or mistake, unless the other party chooses to waive the right to recover in full.[1] Bankruptcy will not convert a mere bailment without power of sale into a debt. If goods or other property are in the defendant's hands for safe-keeping, as where a banker or merchant has taken notes or goods with a view to a discount or advance, and has neglected or refused to make the discount or advance; or where the person asking the set-off has power only to collect the interest or the like,[2] or has received delivery by mistake or fraud, or on any condition, or for any special purpose, inconsistent with a payment of his own debt, such as to pay a debt to some third person, or to save the bankrupt from bankruptcy by an arrangement, the nature of the transaction repels the presumption of a mutual credit.[3] If the bankrupt's property has been mortgaged for the debt of a third person, and the assignees redeem it, the case is not one of mutual credit, but the assignees are to be paid in full;[4] and a liability to pay the bankrupt's debt will not make a case of credit, unless the liability is one which, when paid after the bankruptcy, will be a provable debt.[5]

§ 262. **Promise to pay Cash.** — The right of set-off against the assignees, when the solvent party occupied no fiduciary relation to the bankrupt, will not be lost by a promise on his part to pay cash, or to accept a bill, or even to pay without

[1] Ex parte Whittaker, 1 Rose, 301; Buchanan *v.* Findlay, 9 B. & C. 738; Ex parte Douglas, Mont. & Ch. 1; Alder *v.* Keighley, 15 M. & W. 117. The defrauded party or his assignees may require the set-off. Ex parte Minton, 3 Dea. & Ch. 688.

[2] Brandao *v.* Barnett, 1 M. & G. 908, 12 Cl. & F. 787; Stetson *v.* Exch. Bank, 7 Gray, 425; Simpson *v.* Sikes, 6 M. & S. 295; Lucas *v.* Dorrien, 7 Taunt. 278.

[3] Key *v.* Flint, 8 Taunt. 21; Ex parte Flint, 1 Swanst. 30; Ex parte Hankey, 4 Dea. 1; Buchanan *v.* Findlay, 9 B. & C. 738; Cornforth *v.* Rivett, 2 M. & S. 510; Holmes *v.* Tutton, 5 E. & B. 65; Hill *v.* Smith, 12 M. & W. 618; Haggerty *v.* Palmer, 6 Johns. Ch. 437; United States Bank *v.* McAlester, 9 Penn. St. 475; Re Troy Woollen Co., 8 N. B. R. 412, Fed. Cas. No. 14,203; Palmer *v.* Haynes, 2 La. 370; Blanchard *v.* Lockett, 3 La. Ann. 98; Weston *v.* Barker, 12 Johns. 276; Bishop *v.* Fowler, 35 Conn. 5.

[4] Rowe *v.* Anderson, 4 Sim. 267.

[5] Howe *v.* Snow, 3 Allen, 111.

set-off. If such an agreement would otherwise be binding, bankruptcy changes the condition of the parties; the bankrupt no longer needs the cash to support his credit, and the other party no longer has a solvent person to look to for his counterclaim.[1] It is on this principle that stoppage *in transitu*, and many of the decisions above referred to, on mutual credit, are supported.

§ 263. **Mutual Debts.** — Mutual debts include all those which are provable in bankruptcy, and the right is reciprocal, so that all such debts held by either party may be set off.[2] As the class of such debts has been enlarged from time to time, the right of counterclaim has followed. It has thus happened that many demands may now be set off as debts which formerly could only come in as mutual credits; and others, such as unliquidated damages, are included, even where no credit could be said to have been given, as when the party asking the set-off waives a tort.[3] But a penalty for usury, not made a debt by the statute, may be recovered in full by the assignees, because, if the bankrupt had been the usurer, the penalty would not have been provable.

Even now "mutual credit" is an important phrase. When it is wanting, set-off will be confined to debts which were existing at the date of death or bankruptcy. Thus, when a mortgagee of policies collected the amount after the death of

[1] Lechmere *v.* Hawkins, 2 Esp. 626; Eland *v.* Karr, 1 East, 375; Marks *v.* Barker, 1 Wash. C. C. 178, Fed. Cas. No. 9096; Taylor *v.* Oaky, 13 Ves. 180; Mayor *v.* Nias, 8 Moore, 275; Cornforth *v.* Rivett, 2 M. & S. 510; Groom *v.* West, 8 A. & E. 758; Ex parte Fletcher, 6 Ch. D. 350; Ex parte Jackson, W. N., May 19, 1877, p. 122; Stettinius *v.* Myer, 4 Cranch C. C. 349, Fed. Cas. No. 13,385; Lime Rock Bank *v.* Plympton, 17 Pick. 159; Miller *v.* Florer, 15 Ohio St. 148. The decision in Clarke *v.* Fell, 4 B. & Ad. 404, seems not to harmonize with the foregoing decisions, and may be considered doubtful; and so of Colson *v.* Welsh, 1 Esp. 378. Rose *v.* Sims, 1 B. & Ad. 521, refused set-off against a demand for not *indorsing* a bill, which can hardly be reconciled with the set-off granted against damages for not *accepting* a bill. Groom *v.* West, 8 A. & E. 758. But the former case is now obsolete, because it was put on the ground that the plaintiff's damages were unliquidated, which is not now an objection.

[2] Tucker *v.* Oxley, 5 Cranch, 34, 39, per *Marshall, J.*; Bemis *v.* Smith, 10 Met. 194; Warren *v.* Burnham, 32 Fed. Rep. 579.

[3] Adams *v.* United States, 17 Wall. 207; McCabe *v.* Winship, 17 N. B. R. 113, Fed. Cas. No. 8668.

the mortgagor, he was not allowed to set off his simple contract debt against the surplus, when there were specialty debts unpaid, and the estate was insolvent.[1] In bankruptcy there is no privilege for debts by specialty.

§ 264. **Debts not due; Contingent Debts.** — We have seen that all debts due, but not payable, are admitted to proof;[2] they may, therefore, be used in set-off, either as mutual debts or mutual credits, under which head they were always admissible.[3]

A court of equity will, if necessary, enjoin an action by an insolvent or his assignees on a debt which is payable, in order that a set-off may be made by the defendant at law of one not yet payable.[4] But whether it will do this in default of a statute which makes such debts provable or the subject of mutual credit is an open question. Similar considerations apply to contingent debts and liabilities; so far as they are made provable, they may be set off; and the courts of law or equity, as the modes of practice may prescribe, should require actions to be stayed until the contingency happens or its value can be ascertained, according to the particular provisions of the bankrupt law in that behalf.[5]

§ 265. **Unliquidated Damages.** — We have seen that unliquidated damages could always be proved in this country against the estate of a bankrupt.[6] They could, therefore, be

[1] Talbot *v.* Frere, 9 Ch. D. 568. See Watkins *v.* Lindsay, 5 Manson, 25.

[2] See the chapter on Proof of Debts.

[3] Ex parte Boyle, Cooke, 7th ed., 542; Ex parte Prescot, 1 Atk. 230; Hankey *v.* Smith, 3 T. R. 507, n.; Smith *v.* Hodson, 4 T. R. 211; Atkinson *v.* Elliott, 7 T. R. 378; Marks *v.* Barker, 1 Wash. C. C. 178, Fed. Cas. No. 9096; Feazle *v.* Dillard, 5 Leigh, 30; Demmon *v.* Boylston Bank, 5 Cush. 194; Aldrich *v.* Campbell, 4 Gray, 284; Drake *v.* Rollo, 3 Biss. 273, Fed. Cas. No. 4066; Re City Bank, 6 N. B. R. 71, Fed. Cas. No. 2742; Jones *v.* Robinson, 26 Barb. 310; Re Van Allen, 37 Barb. 225; Fort *v.* McCully, 59 Barb. 87; Yardley *v.* Clothier, 49 Fed. Rep. 337; Mack *v.* Kitsell, 20 Abb. N. C. 293; Nashville Trust Co. *v.* Fourth Nat. Bank, 91 Tenn. 336; *contra*, Homer *v.* Bank of Comm., 140 Mo. 225; Oatman *v.* Batavian Bank, 77 Wis. 501; Kortjohn *v.* Bank, 63 Mo. Ap. 166.

[4] Schuler *v.* Israel, 120 U. S. 506, 510.

[5] As to the various kinds of contingent debts and liabilities, see Arbouin *v.* Tritton, Holt, N. P. 408; Starey *v.* Barns, 7 East, 435; Alsager *v.* Currie, 12 M. & W. 751; Russell *v.* Bell, 8 M. & W. 277; Ex parte Bennett, 25 W. R. 598; Hinds *v.* David, Harper, 423.

[6] *Supra*, § 164.

set off, as now in England, since they have been made provable there; and the decisions against such proof are now obsolete.[1]

§ 266. **Equitable Debts.** — For a like reason, equitable debts and legal debts may be set against each other.

§ 267. **Mutuality.** — The debts or credits must be mutual, which means that the same fund is to be increased or diminished. In questions of mutuality, the courts endeavor, as far as practicable, to ascertain and adjust the rights of the real parties interested; and the difference of decision arises rather from different views about what is practicable, than any concerning the principle itself.

Thus, one who holds the bankrupt's negotiable paper merely as agent of the owner cannot use it in set-off against a debt he personally owes the bankrupt, though he might have sued on it, or even might prove it in bankruptcy in his own name.[2] In Forster *v.* Wilson,[3] the defendants sued by assignees in bankruptcy had three sets of the bankrupt's notes: one they owned; another was transferred to them before the bankruptcy, for a debt, and they were to give credit for whatever

[1] McDonald *v.* Webster, 2 Mass. 498; Sewall *v.* Sparrow, 16 Mass. 24; Graham *v.* Russell, 5 M. & S. 498; Holbrook *v.* Receivers, etc., 6 Paige, 220; Bemis *v.* Smith, 10 Met. 194; Makeham *v.* Crow, 15 C. B. N. s. 847; Booth *v.* Hutchinson, L. R. 15 Eq. 30; West *v.* Baker, 1 Ex. D. 44; Peat *v.* Jones, 8 Q. B. D. 147; Drake *v.* Rollo, 3 Biss. 273, Fed. Cas. No. 4066; Morrison *v.* Jewell, 34 Maine, 146; Third Swedish Church *v.* Wetherell, 43 Ill. App. 414; Newcomb *v.* Almy, 96 N. Y. 308. See Allen *v.* United States, 17 Wall. 207; McCabe *v.* Winship, 17 N. B. R. 113, Fed. Cas. No. 8668. In Orne's Case, 1 Ben. 361, Fed. Cas. No. 10,581, Judge Blatchford expressed the opinion that unliquidated damages due the bankrupt could probably be set off at some stage of the case, but held that this could not be done at the first meeting. In England, unliquidated damages could not be set off at law, nor could equity interfere to require it, until the bankrupt law made them provable debts, unless they could be brought in under recoupment. See Rawson *v.* Samuel, Cr. & P. 161; Best *v.* Hill, L. R. 8 C. P. 10; Beasely *v.* D'Arcy, 2 Sch. & Lef. 403, n. In this country, the almost universal rule excludes these damages for obvious reasons of convenience, but in bankruptcy those reasons yield to the strong equity before so often referred to.

[2] Fair *v.* McIver, 16 East, 130; Belcher *v.* Lloyd, 10 Bing. 310; Forster *v.* Wilson, 12 M. & W. 191; Adams *v.* McGrew, 2 Ala. 675; McDade *v.* Mead, 18 Ala. 214; London, etc. Bank *v.* Narraway, L. R. 15 Eq. 93; Lackington *v.* Combes, 6 Bing. N. C. 71.

[3] 12 M. & W. 191. See Elgood *v.* Harris (1896), 2 Q. B. 491. [On the subject of mutuality, see Re Wilson. 10 Morrell, 219.]

they should recover on them; the third they received merely for collection. It was held that they might set off notes of the first and second classes, but not those of the third class.

§ 268. **Trustee and Cestui que Trust.** — If a trustee is the plaintiff, such as the assignor of a non-negotiable *chose in action*, including the bankrupt when so suing, or the holder of a bill suing the acceptor for the benefit of the drawer, or one who holds under an express trust, a debt due from the trustee personally cannot usually be set off.[1] But it may be set off if the plaintiff is also the *cestui que trust*, or if he has made himself personally responsible to his *cestui que trust*, who has consented to look or is bound to look to his personal credit;[2] and if an action is brought against a trustee personally, for a debt contracted in his representative character, a debt due him personally may be set off.[3] On the other hand, the debt of the *cestui que trust* may be set off in such cases. The case of an assignee in bankruptcy, against whom debts of the bankrupt are set off, is the simplest illustration of the principle. So in the classes of cases already referred to, of one suing simply for the benefit of another.[4] So debts due to and from a testator or intestate, and a debt to the testator against a legacy to his debtor.[5] And I think the better opinion is that against an executor or administrator may be set off a debt due to the defendant from the residuary legatee or next of kin, if the proof is clear that the debts of the estate are all paid or pro-

[1] Boyd *v.* Mangles, 16 M. & W. 337; DeMattos *v.* Saunders, L. R. 7 C. P. 570; Wisdom *v.* Becker, 52 Ill. 342; Newcastle *v.* Bellard, 3 Maine, 369; Thomas *v.* Hopper, 5 Ala. 442; Harbin *v.* Levi, 6 Ala. 399; White *v.* Word, 22 Ala. 442; Bellows *v.* Smith, 9 N. H. 285.

[2] Miller *v.* Franklin Bank, 1 Paige, 444; Grew *v.* Burditt, 9 Pick. 265; McKenzie *v.* Pendleton, 1 Bush, 164; Harrison *v.* Slone, 4 Bush, 577; Hall *v.* Chenault, 13 Ala. 710; Beesley *v.* Crawford, 19 Ohio, 126.

[3] Wolf *v.* Beales, 6 S. & R. 242; Dupuy *v.* Dashiell, 17 La. 60; Wood *v.* Hardy, 11 La. Ann. 760; Myers *v.* The State, 45 Ind. 160; Solliday *v.* Bissey, 12 Penn. St. 347.

[4] Agra & Masterman's Bank *v.* Leighton, L. R. 2 Ex. 56; Thornton *v.* Maynard, L. R. 10 C. P. 695; Gary *v.* Johnson, 72 N. C. 68; Miller *v.* Florer, 15 Ohio St. 148; Holliman *v.* Rogers, 6 Tex. 91.

[5] Granger *v.* Granger, 6 Ohio, 35; Nickerson *v.* Gilliam, 29 Mo. 456 (debt of insane ward); Stone *v.* Fargo, 55 Ill. 71. See Wren *v.* Parish, 39 S. W. Rep. 512 (Ky.).

vided for;[1] but on this point there is a conflict of authority.[2] The question in these more complicated cases is one of convenience.

§ 269. **Legacy accruing after Bankruptcy.** — It was held in Cherry *v.* Boultbee,[3] overruling an earlier decision, that, where a testatrix died after the bankruptcy of her legatee, and before his discharge, her executor could not retain the legacy from the assignees to meet a debt due from the bankrupt to the testatrix. It was not a case of mutual credit under the statute, because the claim on one side had no existence whatever at the date of the bankruptcy; but the right of the assignees was derived from the bankrupt by force of the law which gave them all his after-acquired property up to the time of his discharge; and it would seem that the broad, equitable doctrine of "retainer," which is quite independent of the bankrupt law, might have applied to it. The reasoning to support the decision is, that if the bankrupt should ever obtain his discharge, the debt would be barred as of the beginning of the bankruptcy, and that there should be no greater right against the assignees than there would have been against the debtor.

Following this decision, it has been held that a debtor who had made a valid composition could recover a legacy afterwards left to him by his creditor upon payment of the amount of the composition only.[4] In other words, the discharge in bankruptcy is not a mere bar to an action, like a defence of the Statute of Limitations, but the debt no longer exists.

§ 270. **Bank Account of Trustee or Agent.** — If a trustee or agent has an account with his bankers, which by its form gives notice of the trust, the bank cannot set off against the

[1] Jeffs *v.* Wood, 2 P. Wms. 128; Ranking *v.* Barnard, 5 Madd. 32; Richards *v.* Richards, 9 Price, 219; Courtenay *v.* Williams, 3 Hare, 539; Cochrane *v.* Green, 9 C. B. N. S. 448; Jones *v.* Mossop, 3 Hare, 568; Williams *v.* Davies, 2 Sim. 461; Barrett *v.* Barrett, 8 Pick. 342; Megrath *v.* Gray, L. R. 9 C. P. 216; Bailey *v.* Johnson, L. R. 6 Ex. 279; Rowan *v.* Sharp's Rifle Co., 29 Conn. 282; 31 Conn. 1; Martin *v.* Overton, 1 Mart. (La.) N. S. 586; Heavenridge *v.* Mondy, 49 Ind. 434.

[2] Bishop *v.* Church, 3 Atk. 691; Medlicot *v.* Bowes, 1 Ves. Sen. 207; Freeman *v.* Lomas, 9 Hare, 109; Middleton *v.* Pollock, L. R. 20 Eq. 29; Whyte *v.* O'Brien, 1 Sim. & St. 551.

[3] 2 Keen, 319; 4 Myl. & Cr. 442.

[4] Beswick *v.* Orpen, 16 Ch. D. 202.

surplus of that account the deficiency in the trustee's private account. But the deposit may be apportioned, and if it exceeds what the depositor owes his principal, the part which is his own may be set off.[1] And the truth of the case may always be proved and a set-off may be made, if the relations between the trustee and *cestui que trust* are such as to permit it without injustice, and the trustee asks for it.[2]

If the banker has no notice of the trust, it seems, he may set off debts of the trustee.[3]

§ 271. **Corporations and Shareholders.** — If a corporation or company with limited liability is bankrupt, a shareholder must pay in full, without setting off debts due him by the company, all assessments or calls for capital stock not paid in, or premium notes given to a mutual insurance company, or claims for capital withdrawn; because these dues form a part of the fund to which the general creditors have a right to look, very much like the capital of a deceased copartner which has by his direction been left in the business.[4]

When the liability was unlimited, so that the shareholders were partners, justice between the partners required that each should pay only his net share of the liabilities. and set-off was admitted.[5]

So, by some of the State laws, there is no such *quasi* trust but the assessments are mere debts, and any debt of the company may be set off against them.[6]

And, where both the stockholder and the company are bank-

[1] Ex parte Adair, 24 L. T. N. S. 198; s. c. *nom.* Ex parte Kingston, L. R. 6 Ch. 632.

[2] Pedder *v.* Preston, 12 C. B. N. S. 535; Bailey *v.* Finch, L. R. 7 Q. B. 34.

[3] Jenkins *v.* Walter, 8 Gill & J. 218.

[4] Sawyer *v.* Hoag, 17 Wall. 610; McLaren *v.* Pennington, 1 Paige, 102; Lawrence *v.* Nelson, 21 N. Y. 158; Osgood *v.* Ogden, 4 Keyes, 70; Hillier *v.* Allegany Ins. Co., 3 Penn. St. 470; Jenkins *v.* Armour, 6 Biss. 312, Fed. Cas. No. 7260; Grissell's Case, L. R. 1 Ch. 528; Calisher's Case, L. R. 5 Eq. 214; Barnett's Case, L. R. 19 Eq. 449; Black's Case, L. R. 8 Ch. 254; Re Whitehouse & Co., 9 Ch. D. 595; Howe *v.* Snow, 3 Allen, 111. See Re German Mining Co., 4 De G. M. & G. 19, and the cases there cited; Pondville Co. *v.* Clark, 25 Conn. 97; Boyd *v.* Hall, 56 Ga. 563; Re Duckworth, L. R. 2 Ch. 578; Re Carralli, L. R. 4 Ch. 174; Ex parte Strang, L. R. 5 Ch. 492.

[5] Re West of Eng. Bank, 12 Ch. D. 823; Grissell's Case, L. R. 1 Ch. 528.

[6] Pondville Co. *v.* Clark, 25 Conn. 97; Boyd *v.* Hall, 56 Ga. 563.

rupt, the set-off is usually admitted.[1] Since these assessments are to be paid in full, a set-off may be made between them and the dividends due the shareholder, if both mature at the same time. But the liquidators have no lien on dividends declared to a solvent shareholder, to meet possible future calls. If he should be insolvent, it is within the ordinary power of a court of equity to permit his dividends to be withheld to the extent of his debt to the assignees.

The courts of Connecticut and New Jersey have decided that the depositors of a savings bank have such a community of interest that they are in some sort responsible for each other, so that a depositor has no equity (there being no statute), to set off against his deposit a debt which he owes the savings bank.[2] The opposite result was reached by the Supreme Court of New York.[3] It was held in England, that, when in winding up an insurance company the current policies were to be valued like debts, yet they were not debts, and a set-off could not be made between them and ordinary debts of the company.[4]

§ 272. **Annulling and Discharge as affecting Set-off.** — When the bankruptcy had been annulled, money of the estate which the assignees had deposited with bankers, reverted, in equity, to the bankrupt, even without an order of court, and he was allowed to set off the deposit against a debt he owed the bankers ;[5] and, in the converse case, the assignees, or their bankers, could maintain a set-off against the bankrupt,[6] or against a creditor attaching the debt.[7] When the bankrupt has been refused his discharge, or only his person is relieved, his old debts may be set off against new credits.[8] If he has obtained his discharge, his old debt cannot be set off against an indebtedness to him growing out of new transactions.[9]

[1] Re West of Eng. Bank, 12 Ch. D. 823 ; Grissell's Case, L. R. 1 Ch. 528.

[2] Osborn *v.* Byrne, 43 Conn. 155 ; Stockton *v.* Mech., etc. Bank, 32 N. J. Eq. 163 ; Hannon *v.* Williams, 34 N. J. Eq. 255.

[3] Receiver of New Amst. Bank *v.* Tartter, 54 How. Pr. 385.

[4] Ex parte Price, L. R. 10 Ch. 648.

[5] Bailey *v.* Johnson, L. R. 6 Ex. 279 ; L. R. 7 Ex. 263.

[6] Brown *v.* Coggeshall, 14 Gray, 134.

[7] Beach *v.* Viles, 2 Pet. 675.

[8] Primer *v.* Kuhn, 1 Dall. 452.

[9] Hayllar *v.* Sherwood, 2 Nev. & M. 401.

§ 273. **Joint and Separate Debts.** — As respects set-off between joint and separate debts, an important distinction is taken in this country. If A sues B, C, and D for a debt due from them jointly, there is no good reason why a debt he owes either of them should not be set off, since either defendant has a right to pay the joint debt; and set-off is payment. If A has become bankrupt, there is the more reason to observe this distinction; it is admitted by statute in some States only when the plaintiff is either insolvent or out of the jurisdiction. But the better opinion is in favor of the set-off in all such cases.[1]

When, however, the debt is due to several plaintiffs, or to one plaintiff and others not parties to the record, even though the joint creditors are partners,[2] a debt due from one of them to one or more defendants cannot be set off, because a payment in that mode would be fraudulent, unless made with the consent of the co-owners of the debt sued on, since it would remit a creditor for payment to his co-owners instead of those to whom he had given credit; and though it might be valid in the case of partners, if done out of court in ignorance of the fraud, a court, knowing all the facts, cannot permit it.

[1] Robertson *v.* Parks, 3 Md. Ch. 65; Watkins *v.* Zane, 4 Md. Ch. 13; Gibbs *v.* Cunningham, ib. 322; Meeker *v.* Thompson, 43 Conn. 77; Goodenow *v.* Buttrick, 7 Mass. 140; Baker *v.* Kinsey, 41 Ohio St. 403; Ashley *v.* Willard, 2 Tyler, 391; Robinson *v.* Beall, 3 Yeates, 267; Childerston *v.* Hammon, 9 S. & R. 68; Stewart *v.* Coulter, 12 S. & R. 252; Hurst *v.* Johnston, 6 Phila. 593; Crist *v.* Brindle, 2 Rawle, 121; Balsley *v.* Hoffman, 13 Penn. St. 603; Hollister *v.* Davis, 54 Penn. St. 508; Dunn *v.* West, 5 B. Monroe, 376; Powell *v.* Hogue, 8 B. Monroe, 443; Jones *v.* Jones, 12 Ala. 244; Austin *v.* Feland, 8 Mo. 309; Kent *v.* Rogers, 24 Mo. 306; Meriwether *v.* Bird, 9 Georgia, 594; Wartman *v.* Yost, 22 Gratt. 595; Leach *v.* Lambeth, 14 Ark. 668 (overruling some earlier decisions); Robinson *v.* Furbush, 34 Maine, 509. In a few of these cases the defendant, whose claim was set off, was the principal debtor in the case in suit, which would render his debt available in set-off on equitable grounds when they are recognized by the courts. See *contra*, Palmer *v.* Green, 6 Conn. 14; Dalton City Co. *v.* Dalton Mfg. Co., 33 Georgia, 243.

[2] Glaister *v.* Hewer, 8 T. R. 69; Von Pheel *v.* Connally, 9 Porter, 452; Duramus *v.* Harrison, 26 Ala. 326; Collins *v.* Butler, 14 Cal. 223; Jones *v.* Howard, 53 Miss. 707; Pritchard *v.* Draper, 1 Russ. & Myl. 191; 2 Cl. & Fin. 379; Piercy *v.* Fynney, L. R. 12 Eq. 69; Pierce *v.* Pass, 1 Porter, 232; Taylor *v.* Bass, 5 Ala. 110; Brackett *v.* Sears, 15 Mich. 244; Threlkeld *v.* Dobbins, 45 Ga. 144; Story *v.* Kemp, 55 Ga. 276.

§ 274. **Joint and Separate Debts in Bankruptcy.** — In bankruptcy, debts of the firm and credits of the partners, or *vice versa*, cannot be set against each other, for the additional reason that the joint credits must be applied to pay joint debts, and the separate credits to pay separate debts.[1] Excepting when this principle interferes, there is no objection to the set-off, if by law or by contract the debts are both joint and several, and substantial justice will be done. And if the debt though joint in form is several in equity, it may be set against a separate debt. At law, when one partner or joint debtor is dead, or has been discharged in bankruptcy, there may be a set-off between the separate debts of the surviving partner or contractor and those due the late firm. When, however, a surviving partner is bankrupt, joint credits must go to pay joint debts and separate credits to separate debts, and, therefore, there can be no set-off between the different classes.[2]

§ 275. **Insurance Brokers.** — By a singular course of trade in England, when a marine policy was obtained by a broker, the underwriter gave him exclusive credit for the premium, but was indebted to the assured for losses and return premiums. It was usual to settle the whole account with the brokers, and if a return premium became due, both parties remaining solvent, it was held that the broker might have a set-off against the underwriter;[3] as there was, however, no actual mutuality

[1] "His right," said an eminent judge, of one who attempted to set off a debt due from the firm against one which the assignee in bankruptcy was prosecuting for the estate of one partner, "his right is not coextensive with his obligation. His obligation is to pay the whole; his right is to receive only a part." Per *Sir M. Grant*, Addis *v.* Knight, 2 Mer. 117. See Lanesborough *v.* Jones, 1 P. Wms. 325; Ex parte Goulding, 2 Gl. & J. 118; Ex parte Soames, 3 Dea. & Ch. 320; Ex parte Twogood, 11 Ves. 517; Williams *v.* Brimhall, 13 Gray, 462, where Bigelow, J., states the reason very clearly; Forsyth *v.* Woods, 11 Wallace, 484, per *Strong, J.*; Gray *v.* Rollo, 13 Wallace, 629; Hitchcock *v.* Rollo, 3 Biss. 276, Fed. Cas. No. 6535; Wright *v.* Rogers, 3 McLean, 229, Fed. Cas. No. 18,090. The case of Tucker *v.* Oxley, 5 Cranch, 34, where such a set-off was made, is explained in 2 Story Eq., 13th ed., § 1437, note 1, and in Drake *v.* Rollo, *ubi supra*.

[2] Meader *v.* Leslie, 2 Vt. 569; Waln *v.* Hewes, 5 S. & R. 468; Walker *v.* Eyth, 25 Penn. St. 216; Cosgrove *v.* Cosby, 86 Ind. 511; Shipman *v.* Lansing, 25 Hun, 290; Seligmann *v.* Clothing Co., 69 Wis. 410.

[3] Shee *v.* Clarkson, 12 East, 507.

of credit, if the broker became bankrupt without having paid the premium, the underwriter could not set it off against a loss;[1] and, on the other hand, the assignees of the broker might recover it of the assured;[2] while, if the underwriter was bankrupt, the broker could have no set-off for return premiums or losses, but must pay the assignees the full premium,[3] unless the policy was in his name, and he had an interest in it, either as a part owner of the property insured or by way of lien.[4] The fact that the broker was acting under a *del credere* commission, and so was bound for the loss, was held in one case to give him a right of set-off;[5] but, in later cases, his liability to his principal is held to be *res inter alios* to the assignees of the underwriter, and not to create the necessary mutuality.[4] That case must, therefore, be considered as overruled.

When credit has, in fact, been given, as when an account of completed transactions has been stated and settled between the broker and the underwriter before the bankruptcy of the latter, the broker may set off the amount found due him upon such accounting against any debt afterwards accruing from him to the underwriter; but not a merely conjectural or *pro forma* balance which was to be fully adjusted afterwards.[5] When a sum of money had been paid by a foreign government as compensation for losses by illegal captures, a broker who had retained the policies and other papers in his hands was held to have a lien upon the fund for such a balance, as against the assignees of the underwriters. There was no question of waiver, because he had proved no debt in the proceedings.[6] In that case, the underwriter claimed by subrogation through the assured, and, therefore, was bound by the lien which the broker had as against the assured.

§ 276. **Factors and Brokers.** — There may be mutuality by estoppel, as when an agent has been authorized to deal in his

[1] De Gaminde *v.* Pigou, 4 Taunt. 246.

[2] Power *v.* Butcher, 10 B. & C. 329.

[3] Minett *v.* Forrester, 4 Taunt. 541; Goldschmidt *v.* Lyon, ib. 534; Parker *v.* Smith, 16 East, 382; Wilson *v.* Creighton, 3 Doug. 132.

[4] Baker *v.* Langhorn, 6 Taunt. 519; Peele *v.* Northcote, 7 Taunt. 478; Koster *v.* Eason, 2 M. & S. 112; Parker *v.* Beasley, ib. 423; Lee *v.* Bullen, 8 E. & B. 692 n.

[5] Parker *v.* Smith, 16 East, 382.

[6] Moody *v.* Webster, 3 Pick. 424.

own name as principal, and the person dealing with him has reason to believe, and does believe, him to be the principal, he may set off a debt of the agent against the demand of the principal.[1] The nature of a factor's employment authorizes the persons dealing with him to treat him as a principal,[2] while that of a broker in stock or merchandise excludes this presumption.[3] If the party giving credit knows, at the time the credit is actually given, though after the negotiations had begun, that he is dealing with an agent, no such set-off can be made, but means of knowledge would not necessarily be knowledge.[4]

§ 277. **Form of Action immaterial.** — The right of set-off in bankruptcy will not usually be affected by the form in which the assignees bring their action. They may affirm a voidable sale made by the bankrupt by suing for the price, and then a debt may be set off.[5] It is not, however, the form of action, but the ratification indicated by that form, which admits the counter-claim. When the assignees sue for money which the defendant has obtained in a way which the assignees have the right to disavow, there can be no set-off, though the action is assumpsit.[6] And, on the other hand, if they

[1] See George *v.* Clagett, 2 Smith, L. C., and notes, 1 Smith Merc. Law, 10th ed., 166. See cases of factors in note 2; Collins *v.* Martin, 1 B. & P. 648; Bank of Metrop. *v.* N. E. Bank, 1 How. 234; Parker *v.* Donaldson, 2 Watts & S. 9.

[2] George *v.* Clagett, 7 T. R. 359; Rabone *v.* Williams, ib. 360 n.; Semenza *v.* Brinsley, 18 C. B. N. S. 467; Ex parte Dixon, 4 Ch. D. 133. (See a distinction taken, Turner *v.* Thomas, L. R. 6 C. P. 610.) Mann *v.* Forrester, 4 Camp. 60; Hogan *v.* Shorb, 24 Wend. 458.

[3] Morris *v.* Cleasby, 4 M. & S. 566; Goode *v.* Jones, Peake, 177; Baring *v.* Corrie, 2 B. & Ald. 137; Hurlburt *v.* Pac. Ins. Co., 2 Sumner, 471; Fed. Cas. No. 6919; Higgins *v.* Moore, 34 N. Y. 417; Dunn *v.* Wright, 51 Barb. 244.

[4] Maanss *v.* Henderson, 1 East, 335; Browne *v.* Robinson, 2 Caines, Cas. 341; Moore *v.* Clementson, 2 Camp. 22; Fish *v.* Kempton, 7 C. B. 687; Miller *v.* Lea, 35 Md. 396; Borries *v.* Imp. Ottoman Bank, L. R. 9 C. P. 38; Dresser *v.* Norwood, 14 C. B. N. S. 574; 17 C. B. N. S. 466; Bank Metrop. *v.* N. E. Bank, 6 How. 212; Sweeny *v.* Easter, 1 Wall. 166.

[5] Smith *v.* Hodson, 4 T. R. 211; see Billon *v.* Hyde, 1 Ves. Sr. 327; Sims *v.* Simpson, 1 Bing. N. C. 306.

[6] See Guthrie *v.* Crossley, 2 C. & P. 301; Kinder *v.* Butterworth, 6 B. & C. 42; Buchanan *v.* Findlay, 9 B. & C. 738, explained in Thorpe *v.* Thorpe, 3 B. & Ad. 580; Hill *v.* Smith, 12 M. & W. 618; Spurr *v.* Cass, L. R. 5 Q. B. 656; Bechervaise *v.* Lewis, L. R. 7 C. P. 372; Yale *v.* Nolan, 3 La. An. 449; Dowler *v.* Cushwa, 27 Md. 354; Bartlett *v.*

bring trover, in right of the bankrupt, that is, for a conversion before the bankruptcy, damages of that sort being a provable debt, and the right of set-off being reciprocal, set-off of a debt due from the bankrupt should be admitted. And, in general, the true question is merely of the right, independently of form or of joinder of parties.[1]

§ 278. **Secured Debts.** — That the debt on one side is secured and the other not will not defeat the set-off, which is security of the most absolute kind.[2] But, where the debt due by the bankrupt to his surety was privileged, and the real parties were both insolvent, so that the effect of the set-off would be to deprive the creditors of the surety of the benefit of the privilege, it was refused;[3] and where a legacy was given for the personal support of the legatee, and not to be taken for his debts, such debts, though due to the testator himself were not permitted to be set off by the executor.

§ 279. **Set-off by Reason of Fraud.** — Set-off has sometimes been permitted on the ground of the bankrupt's fraud. A and B had given the bankrupt a joint and several note, in which A was, in fact, only surety. The assignees sued B alone; but it appeared that the bankrupt had fraudulently converted A's property, and on a bill by A and B, the Lord Chancellor required the assignees to admit a set-off of this demand.[4] The reason, though not very clearly brought out in the judgment, appears to be, that A, having a strong equity to compensation, might arrange with B for the set-off; and that the assignees, representing the bankrupt who had defrauded A, were estopped from setting up that A was not the principal, if the parties

Bramhall, 3 Gray, 257; *contra*, Benoist *v.* Darby, 12 Mo. 196.

[1] See note 6, p. 207.

[2] Lanesborough *v.* Jones, 1 P. Wms. 325; Holbrook *v.* Receivers, etc., 6 Paige, 220; Ex parte Globe Ins. Co., 2 Edw. Ch. 625; Von Sachs *v.* Kretz, 72 N. Y. 548; Ex parte Barnett, L. R. 9 Ch. 293 (explaining Clarke *v.* Fell, 4 B. & Ad. 404, which was supposed by several able writers to decide the point otherwise; the fact of the misapprehension is not without some weight in considering whether the decision itself is a sound one.

[3] Meredith *v.* United States, 13 Pet. 486. There the United States were suing for the benefit of the creditors of an insolvent surety, from whose assets a public debt had been paid. The reason given in the text is not that of the court, but is, in my opinion, the only sound reason for the decision.

[4] Ex parte Stephens, 11 Ves. 24.

chose to consider him so. The learned judge afterwards expressed himself satisfied with the decision;[1] and he decided another case upon its authority.[2] But there is no general rule that fraud will work that result.[3]

§ 280. **Set-off as affected by Statute of Limitations.** — The adjustment of mutual debts, whenever made, relates to the beginning of the proceedings, and it is, therefore, no objection to a debt offered in set-off against the assignees, that the time within which an action might be brought upon it has expired, if it had not expired when the proceedings in bankruptcy were begun;[4] nor even that it is now too late to prove it in the bankruptcy;[5] because a creditor is not bound to prove his side of a mutual account. Indeed, under most of the statutes, proof would waive this right of set-off.[6]

If the debt offered against the assignees was barred before the bankruptcy, it cannot be used in set-off, because it never was a provable debt.

So, when a debt is offered against the estate, a set-off in favor of the assignees will be valid, if it was not barred at the beginning of the proceedings.

§ 281. **Debt not arising from Contract before Bankruptcy.** — If a debt to the estate arises after the bankruptcy, as, for instance, through a contract with the assignees, or with the bankrupt when he is no longer able to contract, or when his contract would work a voidable preference, the other party cannot set off a debt due from the bankrupt. This rule applies to the assignees when they are creditors;[7] and if they become

[1] Per *Lord Eldon*, Ex parte Blagden, 19 Ves. 465.

[2] Vulliamy *v.* Noble, 3 Meriv. 593.

[3] Middleton *v.* Pollock, L. R. 20 Eq. 515, in which the cases are carefully examined.

[4] McDonald *v.* Webster, 2 Mass. 498; Parker *v.* Sanborn, 7 Gray, 191; Von Sachs *v.* Kretz, 72 N. Y. 548.

[5] McDonald *v.* Webster, 2 Mass. 498.

[6] *Infra*, § 284.

[7] Boinod *v.* Pelosi, 2 Dall. 40; McIver *v.* Wilson, 1 Cranch C. C. 423, Fed. Cas. No. 8833; Tunno *v.* Bethune, 2 Desaus. 285; Bateman *v.* Connor, 1 Halst. 104; French *v.* Stanton, 1 La. An. 8; Dwight *v.* Carson, 2 La. An. 459; Crosbie *v.* Leary, 6 Bosw. 312; Clark *v.* Brockway, 3 Keyes, 13; McDonald *v.* Black, 20 Ohio, 185; Groom *v.* Mealey, 2 Bing. N. C. 138; Thomason *v.* Frere, 10 East, 418; Ex parte Blagden, 19 Ves. 465; Simpson *v.* Sikes, 6 M. & S. 295; Wood *v.* Smith, 4 M. & W. 522; West *v.* Pryce, 2 Bing. 455; Graham *v.*

bankrupt, their successors are not bound to set off the debt due from the bankrupt to the former assignees against a balance they owe for assets received, but may set off or retain the dividends.[1] *E converso*, debts contracted on behalf of the estate cannot be paid by setting off debts due from the bankrupt.[2] If, therefore, the assignees have paid too much to a creditor, and the bankrupt makes a composition, he may recover from the creditor the amount of the overpayment.[3] When the reason fails, the rule ceases. Thus, where the United States became indebted to the assignees, they were allowed to set off a debt due them from the bankrupt, because they are to be paid in full from any assets in hand. So a shareholder, bound to pay assessments in full, may set them against a debt the assignees owe him for services to the estate.[4]

§ 282. **Sureties.** — A surety, paying the debt of his principal after the bankruptcy, may, of course, set it off, because the obligation was incurred before that time;[5] and the debt is provable. So of other persons liable for the bankrupt. But where the defendant, though by a single demise, was sub-tenant of the bankrupt of two tenements held by the bankrupt under different leases, and the assignees had accepted lease A and rejected lease B, it was held that they might recover in full the rent due of the sub-tenant for the premises A, and that he could not set off a debt which had accrued to him from the bankrupt since the bankruptcy by a seizure of his goods by the superior landlord of premises B. Here, there was no contract or undertaking before the bankruptcy, so that there was neither mutual debt nor credit at that time.[6]

Allsopp, 3 Ex. 186; Sankey Brook Coal Co. *v.* Marsh, L. R. 6 Ex. 185; Beeler *v.* Turnpike Co., 14 Penn. St. 162. So in settling the estates of decedents: Dale *v.* Cooke, 4 Johns. Ch. 11; Mills *v.* Lumpkin, 1 Kelly (Ga.), 511; Mercer *v.* Lobit, 10 La. An. 47; Harte *v.* Houchin, 50 Ind. 327; Vincent *v.* Gandolfo, 12 La. An. 526; Johnson *v.* Gunter, 6 Bush, 534; James *v.* McPhee, 9 Col. 486.

[1] Ex parte Bebb, 19 Ves. 222; Ex parte Graham, 3 Ves. & B. 130; Ex parte Bignold, 2 Madd. 470; Ex parte Rough, cited, ib. 474.

[2] Re Gen. Ex. Bank, L. R. 4 Eq. 138; Ex parte Wucherer, 2 Dea. & Ch. 27.

[3] Goodrich *v.* Lincoln, 93 Ill. 359.

[4] Allen *v.* United States, 17 Wall. 207; Ex parte Clark, L. R. 7 Eq. 550.

[5] Collins *v.* Jones, 10 B. & C. 777; Ex parte Barrett, 13 W. R. 559.

[6] Graham *v.* Allsopp, 3 Ex. 186.

§ 283. **Burden of Proof.** — The party relying on a set-off has the burden of proof, and this requires the indorsee of negotiable paper to prove, among other things, that he was the holder at the time of the bankruptcy.[1]

§ 284. **Proof without Credit is a Waiver.** — If a creditor knowingly and deliberately proves his full debt, giving no credit to the assignees, he cannot afterwards set off the same debt against them.[2] But if the proof has been made by inadvertence, or mistake, the court of bankruptcy will permit a withdrawal; and the court in which the set-off is pleaded will sometimes take this permission for granted, and allow the set-off upon the undertaking of the defendant to procure it.[3]

The rejection of a debt in bankruptcy, not appealed from, will not necessarily prevent its use in set-off, because the rejection may have been put on the very ground of the mutual debt, or the failure to appeal may have been for that reason.[4]

It may be doubted whether proof will be a waiver, if the court or magistrate before whom it is made, has not full power to adjust the set-off.[5] But if a debt had been rejected on its merits, the rejection would be a judgment binding the same parties in the subsequent litigation.[6]

§ 285. **Debt bought after Bankruptcy; Notice.** — The equality of creditors forbids the set-off of a debt bought after the time to which the assignees' title relates.[7] Under voluntary

[1] Dickson *v.* Evans, 6 T. R. 57; Ouchterlony *v.* Easterby, 4 Taunt. 888; Moore *v.* Wright, 6 Taunt. 517; Collins *v.* Jones, 10 B. & C. 777; Ogden *v.* Cowley, 2 Johns. 274; Speers *v.* Sterrett, 29 Penn. St. 192.

[2] Stammers *v.* Elliott, L. R. 3 Ch. 195; Hall *v.* U. S. Ins. Co. 5 Gill. 484; Brown *v.* Farmers' Bank, 6 Bush, 198; Russell *v.* Owen, 61 Mo. 185; Hunt *v.* Holmes, 16 N. B. R. 101, Fed. Cas. No. 6890.

[3] Bize *v.* Dickason, 1 T. R. 285; Ex parte Staddon, 3 M. D. & De G. 256; Ex parte Dicken, Buck, 115; Bemis *v.* Smith, 10 Met. 194.

[4] Wright *v.* Dunham, 9 Pick. 37; Catlin *v.* Foster, 1 Sawyer, 37 Fed. Cas. No. 2519.

[5] Bordman *v.* Smith, 4 Pick. 212.

[6] Thomas *v.* Griffith, 2 De G. F. & J. 555.

[7] Marsh *v.* Chambers, 2 Str. 1234; Dickson *v.* Evans, 6 T. R. 57; Ex parte Blagden, 19 Ves. 465; Northern Trust Co. *v.* Healy, 61 Minn. 230; Huse *v.* Ames, 104 Mo. 91; Ex parte Stone, 1 Gl. & J. 191; Ex parte Barrett, 34 L. J. Bkcy. 41; 4 De G. J. & S. 756; Middleton *v.* Pollock, L. R. 20 Eq. 29; Hamilton's Asst., 26 Ore. 579; Ogden *v.* Cowley, 2 Johns. 274; Johnson *v.*

assignments, not regulated by statute, there must be notice of the assignment to prevent a set-off.[1] But, as the proceedings in bankruptcy are public, notice of them is presumed, and affects even the purchaser of a negotiable note not due.[2]

Whether notice of the actual insolvency of a debtor will prevent the set-off of a debt bought after the notice, if the debtor eventually becomes bankrupt, is not fully decided. The weight of authority in this country is rather against such set-off;[3] strict reasoning seems to me in its favor.[4] Equity, at all events, will not interfere to aid such a set-off.[5]

§ 286. **Set-off lost or waived.** — The right of set-off may be lost or waived by agreement, or by conduct which would make its enforcement inequitable, as when one party having a set-off has permitted his debtor to deal with a chose in action as unincumbered.[6]

§ 287. **Set-off subject to Equities of Third Persons.** — The amount of the set-off may be diminished by the intervening equities or liens of third persons. Thus, in setting off judgments and decrees, the lien of the attorneys and solicitors for costs must be respected.[7] A principal cannot, by admitting a

Bloodgood, 2 Caine's Cas. 303; Humphreys *v.* Blight, 1 Wash. C. C. 44, Fed. Cas. No. 6870; Finney *v.* Bennett, 27 Gratt. 365; Schmidt *v.* New Orleans, 33 La. An. 17; Bauer *v.* Teasdale, 25 Mo. Ap. 25; Van Dyck *v.* McQuade, 85 N. Y. 615; Union Bank *v.* Hicks, 67 Wis. 189. And see Crisp *v.* Dunn (N. J.) 29 Atl. Rep. 166. See Fera *v.* Wickham, 135 N. Y. 223, for a criticism of the New York cases.

[1] Brashear *v.* West, 7 Pet. 608.

[2] Ex parte Dey, 2 Cox, 423; Re China S. S. Co., L. R. 7 Eq. 240; Humphreys *v.* Blight, 1 Wash. C. C. 44, Fed. Cas. No. 6870; Smith *v.* Brinkerhoff, 6 N. Y. 305.

[3] Smith *v.* Hill, 8 Gray, 572; Hitchcock *v.* Rollo, 3 Biss. 276, Fed. Cas. No. 6535; Rollins *v.* Twichell, 14 N. B. R. 201; Mattocks *v.* Lovering, ib. 208, note; Kennedy *v.* Savings Inst., 36 La. An. 1; Stone *v.* Dodge, 96 Mich. 514.

[4] See Dickson *v.* Cass, 1 B. & Ad. 343; Hawkins *v.* Whitten, 10 B. & C. 217; Heppard *v.* Beylard, 1 Whart. 223; McGowan *v.* Budlong, 79 Penn. St. 470; Conroy *v.* Dunlap, 104 Cal. 133.

[5] Re Receiver Mid. Dist. Bank, 1 Paige, 585; Watts *v.* Christie, 11 Beav. 546; Diven *v.* Phelps, 34 Barb. 224; Hunt *v.* Holmes, 16 N. B. R. 101, Fed. Cas. No. 6890. [The act of 1898 forbids this set-off, § 68 b. See *infra*, § 531.]

[6] Higgs *v.* Assam Tea Co., L. R. 4 Ex. 387; Re Hercules Ins. Co., L. R. 19 Eq. 302; Collins *v.* Waddle, 4 Mo. 452.

[7] The Court of Common Pleas in England formerly denied this right to the attorney, but this was corrected by rule of court, and afterwards by a statute, which adopted the rule prevailing in chancery, that the costs must have been

set-off, deprive the factor of his lien for advances. If negotiable paper has been pledged by an agent or banker to a bona fide holder, the set-off of the principal against his agent is subject to the payment of the pledgee's debt.[1] In all these cases the surplus may be set off.[2] When the husband was, at law, entitled to reduce to possession a legacy due his wife, and he became bankrupt, being debtor to the testator's estate, a moiety or other proper share of the legacy was to be settled on the wife, and the remainder could be set off. We have already seen that a preference is rather a constructive than an actual fraud, and that when security given to a creditor is voidable as to the old debt, it may be held good for the fresh advances. This rule applies, of course, when the question is one of set-off.

incurred in a separate action. The solicitor cannot set off costs of an interlocutory order in the same suit, because he takes the risk of the ultimate result of the suit. See Mitchell *v.* Oldfield, 4 T. R. 123; Randle *v.* Fuller, 6 T. R. 456; Glaister *v.* Hewer, 8 T. R. 69; Middleton *v.* Hill, 1 M. & S. 240; George *v.* Elston, 1 Bing. N. C. 513; Lees *v.* Reffitt, 3 A. & E. 707; Scott *v.* De-Richebourg, 11 C. B. 447; Cattell *v.* Simons, 6 Beav. 304; Collett *v.* Preston, 15 Beav. 458; Verity *v.* Wylde, 4 Drew. 427; Bawtree *v.* Watson, 2 Keen, 713; Rawson *v.* Samuel, Cr. & P. 161; Ex parte Cleland, L. R. 2 Ch. 808; Ex parte Smith, L. R. 3 Ch. 125; Throckmorton *v.* Crowley, L. R. 3 Eq. 196; Harmer *v.* Harris, 1 Russ. 155; Rowe *v.* Langley, 49 N. H. 395.

[1] Jones *v.* Hawkins, 17 Ind. 550; Ellis *v.* Smith, 38 Maine, 114.

[2] Ex parte Hodgkin, L. R. 20 Eq. 746. See *supra* note as to Traders' Bank *v.* Campbell, 14 Wall. 87.

CHAPTER XII.

ASSIGNEES.

§ 288. **Assignees or Trustees.** — The persons chosen or appointed to represent the estate of a bankrupt were formerly called assignees, because an assignment of the debtor's property was made to them by the court or commissioners. They are now more commonly called trustees, and in some states and countries syndics. The powers and duties of executors, administrators, liquidators, and receivers under statutes for the settlement of the insolvent estates of deceased persons and of corporations are very similar to those of such trustees. Most of these names are more or less ambiguous. There may be trustees appointed by deed or will, receivers for special purposes, and assignees by act of the party, and the rights of such persons are in some respects different from those of assignees or trustees in bankruptcy. These last, by whatever name they may be called, derive their title and power from the law and the decree, and the words of the assignment are of no particular importance. Indeed the assignment is now, under many of the statutes, dispensed with, and the property is transferred by force of the decree alone.[1]

The receivers under certain statutes, as the National Bank Acts, are trustees who may sue in their own name.[2]

§ 289. **Appointment of Assignee.** — The assignees are usually chosen by the creditors subject to the approval of the court. If two or more joint trustees were voted for, and some were

[1] Act of 1898, § 70. See *infra*, § 533.

[2] Davis *v.* Gray, 16 Wall. 203. As to assignees of claims against the United States, see Rev. Sts. (U. S.) § 3477: Hobbs *v.* McLean, 117 U. S. 567; Goodman *v.* Niblack, 102 U. S. 556; Bailey *v.* U. S., 109 U. S. 432; Freedman's Sav. Bk. Tr. Co. *v.* Shepherd, 127 U. S 494.

elected and others not, or all were elected and one declined, it was the practice in England to order a new election as to all.[1] Our practice is to confirm such as are elected, and to fill the vacancy by election or appointment, or to leave it unfilled, as the court, having regard to the interests and wishes of the creditors, may decide.[2]

§ 290. **Confirmation; Qualifications.** — The assignees should have no interest adverse to that of the general creditors. Creditors may be trustees if their claims are not disputed; but if there is reasonable cause to doubt their validity or to suppose that a preference has been given for some part of them, the choice should not be confirmed.[3]

The most usual objection is that the bankrupt himself has influenced the choice by canvassing for votes. As he has no legitimate interest except to have an honest man appointed, his interference is sufficient ground for rejection,[4] and a near relative of the bankrupt has been held ineligible.[5] If the assignee has procured a creditor to prove for the purpose of voting for him, and there have been no other proofs, the choice will not be confirmed.[6] It is not necessary to prove disqualification by direct evidence. The courts have full power over the subject, and may properly act in so purely personal a matter, and one which is summary, upon appearances, it being understood that they so act, and that a rejection is no imputation upon the character of the person rejected.

§ 291. **Confirmation; Qualifications.** — It is not usual to refuse confirmation because some creditors have been unable to attend the meeting, or even because some debts have been

[1] Ex parte Shaw, 1 Gl. & J. 124; Ex parte Wilson, 1 M. D. & DeG. 234; Ex parte Cattaral, 1 Dea. 193; Ex parte Rolls, 1 Dea. 618; Ex parte Wolverhampton Bkg. Co., 6 L. T. N. S. 207.

[2] Van Valkenburgh *v.* Elmendorf, 13 Johns. 314.

[3] Ex parte Ashmore, 3 M. D. & DeG. 461. See Re Lamb (1894), 2 Q. B. 805; Re Mardon, 2 Manson, 511.

[4] Ex parte Molineux, 1 Dea. 603; Ex parte Carter, 3 DeG. & J. 116; Re Houghton, 2 Lowell, 243, Fed. Cas. No. 6729; Ex parte Morse, DeG. 478.

[5] Re Stillwell, 2 N. B. R. 526, Fed. Cas. No. 13,447; Williamson *v.* Wilson, 1 Bland, 418; Re Zinn, 4 N. B. R. 370, Fed. Cas. No. 18,216; 4 N. B. R. 436, Fed. Cas. No. 18,215.

[6] In re A. B., 3 Ben. 66, Fed. Cas. No. 2.

erroneously rejected by the register.[1] But each case depends upon its own circumstances. If a great majority of creditors have lost their votes without their fault, the election may be set aside.[2]

An assignee must usually be a resident within the jurisdiction, and his permanent removal will be ground for displacing him.[3] But it is not unusual, when there are assets in different states, to appoint one or more assignees out of the jurisdiction jointly with others within it.[4] In such case the non-resident assignees should file an irrevocable power of attorney to some person within the jurisdiction to receive service of all processes in the bankruptcy as well as the usual bond. Where there is an ancillary administration, the assignee of the principal jurisdiction may be appointed under similar safeguards.[5]

§ 292. **Removal of Assignee.** — The court has power to remove an assignee for cause.[6] An appellate court will rarely reverse the decision of the court of original jurisdiction in this matter unless upon a mistake of law.[7]

§ 293. **Additional Assignee.** — When a class of creditors had rights distinct from those of the electors, such as separate creditors when the election was by creditors of a partnership, it was the practice in England to appoint an "inspector" or person having powers of oversight, but not of management, to represent them.[8] Our late law met such wants more directly and efficiently by permitting the court to appoint additional

[1] Ex parte Kimber, 11 Ch. D. 869; Ex parte Surtees, 12 Ves. 10; Ex parte Milner, 3 Dea. & Ch. 235; Ex parte Durent, Buck, 201; Ex parte Thompson, Buck, 201 note.

[2] Ex parte Edwards, Buck, 411; Ex parte Hawkins, Buck, 520; Ex parte Danby, Mont. 67; Ex parte Stallard, 2 M. D. & De G. 469; Ex parte Dechapeaurouge, Mont. & MacA. 174; Ex parte Spiller, 2 M. D. & De G. 43; Ex parte Bousfield, Mont. 128; Re Gilley, 1 Lowell, 250 Fed. Cas. No. 5438.

[3] Re Harris, 2 N. B. R. 105, Fed. Cas. No. 6112; Anon. 2 N. B. R. 68, Fed. Cas. No. 461; Ex parte Grey, 13 Ves. 274; Ex parte Daniell, 3 M. D. & De G. 612.

[4] Re Boston, &c. R. R., 5 N. B. R. 233, Fed. Cas. No. 1680.

[5] High, Receivers, 3d ed. § 388 a; Wilmer *v.* Atlanta R. R. Co., 2 Woods, 409, Fed. Cas. No. 17,775; Taylor *v.* Life Assn., 3 Fed. Rep. 465.

[6] Act of 1898, § 2 (17). See *infra*, § 465.

[7] Re Adler, 2 Woods, 571, Fed. Cas. No. 82.

[8] Ex parte Ackroyd, 1 M. D. & De G. 555; Ex parte Wright, 2 M. D. & De G. 434; Ex parte Holford, 2 M. D. & De G. 485; Ex parte Sanderson, 3 M. D. & De G. 300; Ex parte Dawson, 3 Dea. & Ch. 12.

assignees when necessary.[1] The reasonable wishes of a large majority of the creditors will be followed by the courts in appointing such inspectors or additional assignees.[2]

§ 294. **Assignment cannot be Collaterally Impeached.** — The decree or assignment, like other decrees in bankruptcy, cannot be collaterally impeached.[3] In an action by the trustees, therefore, it is enough for them to allege their appointment without alleging the acts of bankruptcy and other facts which prove it to have been well founded.[4] The only objections which can be made in a collateral suit, are that the law under which they were appointed is unconstitutional, or that the court was without jurisdiction.[5] It has been held that even want of jurisdiction cannot be shown in a collateral action,[6] and this is true if the jurisdiction depends on facts which the court of bankruptcy has actually passed upon; but if the proceedings have been *ex parte*, it would seem to be otherwise.

This doctrine has been but lately adopted in England. There it was formerly permitted to any creditor who had not become a party to the proceedings to prosecute his action at law and seize the property of the debtor, and the questions were then tried, collaterally, whether the bankrupt were a trader, and had committed an act of bankruptcy, and so on.[6] In one case, £20,000 was spent to ascertain whether a banker had become bankrupt, and then was settled by a compromise.[7] By gradual amendments the law has at last been brought to the point where it has always stood in the United States.

§ 295. **The Assignees as Officers of the Court.** — The assignees are, in a certain sense, officers of the court of bank-

[1] Act of 1867, § 13, 14 Stats. 522, R. S. § 5034. [There is no such provision in the act of 1898.]

[2] Re Assn. of Land Financiers, 10 Ch. D. 269.

[3] Michaels *v.* Post, 21 Wall. 398; Sloan *v.* Lewis, 22 Wall. 150; Lamp Chimney Co. *v.* Brass Co., 91 U. S. 656; Graham *v.* Bost. H. & E. R. R. Co., 118 U. S. 161; Chapman *v.* Brewer, 114 U. S. 158. See Cadle *v.* Baker, 20 Wall. 650; Shryock *v.* Basehore, 82 Penn. St. 159; Tua *v.* Carriere, 117 U. S. 201; Cloutier *v.* Lemée, 33 La. An. 305; Platt *v.* Crawford, 8 Abb. Pr. N. S. 297; Palmer *v.* Jordan, 163 Mass. 350.

[4] Carr *v.* Gale, Davies (2 Ware), 328, Fed. Cas. No. 2434; Lakin *v.* First Nat. Bank, 13 Blatch. 83, Fed. Cas. 7999.

[5] Re Ives, 5 Dillon, 146, Fed Cas. No. 7115.

[6] See *infra*, § 427.

[7] Ex parte Chambers, 1 Dea. 197, 2 Dea. 494, 3 Dea. 1.

ruptcy. As such they are subject to summary proceedings in respect to the execution of their trust.[1] It has sometimes been held that their custody is that of the court, as fully as is the case with receivers.[2] But the authorities do not support this view. They are trustees appointed by and accountable to the court; but their legal title is absolute, and they may act or be proceeded against as owners of the assigned property subject to their responsibility to the court. This was early decided and is the law,[3] and a great many cases cited in this chapter take the point for granted and implicitly decide it. The opposite theory was founded upon the *dicta* under the act of 1841, that all controversies could be settled by petition in the bankruptcy; but this doctrine is exploded.[4]

§ 296. **Assignees represent the Creditors and the Debtor.** — The assignees occupy the double relation of representatives of the debtor and representatives of his creditors. In the former relation they own all property which the debtor could himself have assigned, or in the quaint language of one of the early statutes could "depart withal;"[5] or, as put in another statute, all effects and estate to which he was any ways interested, or which any person hath in trust for him or whereby he hath any profit, possibility of profit, benefit or advantage whatsoever.[6] This, of course, includes all equitable interests of which he has the disposal.

As representing creditors, the assignees may set aside conveyances which creditors could impeach at common law or by statute,[7] as well as such as the bankrupt act itself avoids, such as preferences. The law of maintenance has never been applied to assignees in bankruptcy, so that they may sell rights of action which the bankrupt himself could not.

[1] Ex parte Clegg, 1 Mont. & A. 91; Ex parte Pearce, 2 M. D. & De G. 142; Ex parte Law, De G. 378.

[2] Re Vogel, 2 N. B. R. 427, Fed. Cas. No. 16,983; Hewett *v.* Norton, 1 Woods, 68, Fed. Cas. No. 6441.

[3] Anon., 1 Atk. 102; Ex parte Plummer, ib. 103; Briggs *v.* Sowry, 8 M. & W. 729; Leighton *v.* Harwood, 111 Mass. 67.

[4] Smith *v.* Mason, 14 Wall. 419; Marshall *v.* Knox, 16 Wall. 551.

[5] 13 Eliz. c. 7, § 2.

[6] 5 Geo. II. c. 30, § 1.

[7] Act of 1898, § 70 e.

§ 297. **Time of vesting; Relation.** — In England a trader was bankrupt from the time he had committed an act of bankruptcy, and the title of the assignees related back to the act, which may have been committed secretly and years before the adjudication. This rule led to great injustice, and has been often modified by shortening the time of relation and by protecting certain classes of transactions; but even in its most mitigated form it appears to be liable to great objection. The doctrine has not been adopted in the United States, and it will not be needful for us to explain it in full. Our various bankrupt laws have usually made the commencement of the proceedings the date to which the assignees' title shall relate. In Massachusetts it relates to the first publication of the notice of the warrant in voluntary cases, and of the notice that a petition has been filed in cases *in invitum*.

That there should be some relation back in order to prevent frauds by the bankrupt is generally though not universally admitted. There may be occasionally hardship to innocent persons dealing with the bankrupt; but this evil is thought to be less than would arise if the bankrupt after a petition was filed by or against him could deal with his property freely. The best safeguard appears to be the early and full publication of notice to the world of the existence of the proceedings.[1]

§ 298. **Relation, continued.** — If a certain date, such as the filing of a petition in bankruptcy, or the publication of a warrant, is fixed by statute for the vesting of the assignee's title by relation, notice to a judgment creditor or to any one dealing with the debtor (not, of course, by way of preference), that a petition is about to be filed, or a warrant will presently be published, has not the effect to carry the relation back to the notice.[2]

[1] See the remarks in Garland *v.* Carlisle, 4 Clark & Fin. 693, 703; Re Gregg, 3 N. B. R. 529, Fed. Cas. No. 5796; Mays *v.* Manuf. Bank, 64 Pa. St. 74; Miller *v.* O'Brien, 9 Blatch. 270; Fed. Cas. No. 9586; Ex parte Rabbidge, 8 Ch. D. 367. [Under the act of 1898 the trustee's title relates to the time of adjudication. § 70 a. See *infra*, § 533.]

[2] Briggs *v.* Parkman, 2 Met. 258; Fogg *v.* Willcutt, 1 Cush. 300; Clarke *v.* Minot, 4 Met. 346; Ex parte Hallifax, 2 M. D. & De G. 544; Brewin *v.* Short, 5 E. & B. 227; Conway *v.* Nall, 1 C. B. 643; Ex parte Wright, 3 Ch. D. 70.

§ 299. **Relation, continued.** — It has often been held that unless there is some exception in the statute, the relation avoids all acts, even such as are done under an order of court, such as a levy of execution or a payment by a garnishee.[1] There are, however, cases of very high authority which decide that a sheriff or garnishee acting under a decree or order without actual notice, even when the adjudication has been made and there is no question of relation, shall be excused from responsibility to the trustees.[2] All agree that the judgment creditor is responsible to the trustees, and that the sheriff or garnishee, if obliged to pay a second time, could have his remedy against the creditor. The difference between the decisions, therefore, is important only when the creditor is unable to respond.

§ 300. **Assignment; Notice.** — It is a rule in equity that as between two purchasers of equitable choses in action, such as a claim upon a trust fund, he has the better right who first acquires the legal title; and this is acquired by notice to the trustee or holder of the fund. Courts of chancery in England applied this rule in bankruptcy and preferred an innocent purchaser from the bankrupt after his bankruptcy, who had given such notice, before his assignees who had given none,[3] unless the trustee had actual knowledge of the bankruptcy.[4] These decisions did not rest upon estoppel.

The reasoning appears fallacious, because the decree vests in the assignees all legal as well as equitable titles, and is notice to all the world.[5] This doctrine has been doubted, and the decisions on the point are not easily reconcilable.[6] I am not

[1] Garland *v.* Carlisle, 4 Cl. & Fin. 693; Edwards *v.* Sumner, 4 Cush. 393; Butler *v.* Mullen, 100 Mass. 453; Stevens *v.* Mech. Bank, 101 Mass. 109.

[2] Wood *v.* Dunn, L. R. 2 Q. B. 73; Conner *v.* Long, 104 U. S. 228. And see under the earlier statutes: Cary *v.* Crisp, 1 Salk. 108; Foster *v.* Allanson, 2 T. R. 479; Prickett *v.* Down, 3 Camp. 131; Belcher *v* Mills, 2 C. M. & R. 150; Reynolds *v.* Wedd, 4 Bing. N. C. 694.

[3] Re Barr's Trusts, 4 K. & J. 219; Re Brown's Trusts, L. R. 5 Eq. 88; Stuart *v.* Cockerell, L. R. 8 Eq. 607; Re Russell's Policy Trusts, L. R. 15 Eq. 26; Birmingham Bank. Co. *v.* Carter, 20 W. R. 354; Lysaght *v.* Edwards, 2 Ch. D. 499.

[4] Lloyd *v.* Banks, L. R. 3 Ch. 488.

[5] See § 300, *infra*.

[6] Compare Re Bright's Settlement, 13 Ch. D. 413, approving Re Coombe's Trustee, 1 Giff. 91; Palmer *v.* Locke, 18 Ch. D. 381; Re Atkinson, 2 De G. M. & G. 140; Re Brown's Trusts, L. R. 5 Eq. 88, and cases *supra*, note 1.

aware that the rule was ever applied in this country. I refer, in rejecting it, to cases in which the assignees are not estopped by conduct.[1] Where the trustee of the fund has in good faith transferred it to the purchaser, an estoppel might be easily discovered in order to protect him.

With the exceptions above mentioned notice of the assignees' title is not necessary even against *bona fide* purchasers from or debtors making payment to the bankrupt, because the title devolves absolutely, and the proceedings are judicial and therefore notorious. And it makes no difference that the law requires the assignees to record their assignment and they have failed to do so.[2]

§ 301. **All the Property of the Debtor vests in the Assignees.** — Every existing interest, legal or equitable, of the bankrupt, in any property or contract, however remote or contingent its enjoyment may be, and however small the present value, vests in his assignees, subject, of course, to the contingencies.[3]

A policy on the bankrupt's life passes, and whenever thereafter it becomes payable the assignees may recover the whole money; so of other policies owned by him.[4] It was said in one case that they can only claim the surrender value

[1] Penny *v.* Pickwick, 16 Beav. 246; Meggy *v.* Imp. Disc. Co., 3 Q. B. D. 711; Ex parte Ford, 1 Ch. D. 521.

[2] Willis *v.* Freeman, 12 East, 656; Cole *v.* Coles, 6 Hare, 517; Re Calcott's Contract (1898), 2 Ch. 460; Johnson *v.* Neale, 6 Allen, 227; Re Lake, 3 Biss. 204, Fed. Cas. No. 7992; Howard *v.* Crompton, 14 Blatch. 328, Fed. Cas. No. 6758; Stevens *v.* Mech. Bank, 101 Mass. 109; Butler *v.* Mullen, 100 Mass. 453; Davis *v.* Anderson, 6 N. B. R. 145, Fed. Cas. No. 3623; Re Gregg, 3 N. B. R. 529, Fed. Cas. 5796.

[3] Jacobson *v.* Williams, 1 P. Wms. 382; Higden *v.* Williamson, 3 P. Wms. 132; Churchill *v.* Marks, 1 Coll. 441; Morgan *v.* Taylor, 5 C. B. N. S. 653; Davidson *v.* Chalmers, 33 Beav. 653; Gardner *v.* Hooper, 3 Gray, 398; Pierce *v.* Lee, 9 Gray, 42; Beecher *v.* Gillespie, 6 Ben. 356, Fed. Cas. No. 1224; Nash *v.* Nash, 12 Allen, 345; Dunn *v.* Sargent, 101 Mass. 336; Minot *v.* Tappan, 122 Mass. 535; Daniels *v.* Eldredge, 125 Mass. 356; Belcher *v.* Burnett, 126 Mass. 230; Russell *v.* Clark, 7 Cranch, 69; Smith *v.* Scholtz, 68 N. Y. 41; Ex parte Bolton, 1 M. D. & De G. 667; Putnam *v.* Story, 132 Mass. 205; Evans *v.* Wall, 159 Mass. 164.

[4] Schondler *v.* Wace, 1 Camp. 487; West *v.* Reid, 2 Hare, 249; Ex parte Tierney, Mont. 78; Ex parte Carbis, 4 Dea. & Ch. 354; Williams *v.* Thorp, 2 Sim. 257; Edwards *v.* Scott, 1 M. & G. 962; Re Newland, 7 Ben. 63, Fed. Cas. No. 10,171; Re Miller, 6 Ch. D. 790; Gibson *v.* Overbury, 7 M. & W. 555; Bassett *v.* Parsons, 140 Mass. 169; Vetterlein *v.* Barnes, 124 U. S. 169.

of his life policy, because they have no right to keep the policy alive.[1] The decision in that case was sufficiently favorable to the assignees, because they had not kept the policy alive, and yet claimed its fruits of the bankrupt's wife, who had. But they might, with the consent of the creditors or of the court, have kept it alive, and have collected the full amount, though the statute gives no power to the assignees to require the bankrupt to be examined with a view to procuring such insurance.[2]

§ 302. **Assignees as Owners.** — The assignees own the property, and their deed, though for a nominal consideration, passes an indefeasible title.[3] Any law or rule of court which requires that they shall enforce their rights in a certain way is directory and not a condition precedent. It was held in a few cases under the law of 1841 that if the assignees failed to obtain an order of court before making sale of the assets, or failed to conform strictly to the order, the sale was void.[4] These decisions are unsound, because third persons have no concern with the mode in which the trust is executed, as it is a trust and not a mere power. If assignees are required to obtain leave of court or a vote of creditors before bringing suit, it is no defence to a suit by them that they have failed to obtain such order or vote; and so of any other act.[5] If they are required to sell by auction, their sale by private contract passes a good title.[6] They may make contracts which are beneficial to the estate and aid in its settlement.[7] If they are bound to record the assignment, their title is better than that of even a

[1] Re McKinney, 15 Fed. Rep. 535. See Act of 1898, § 70 (5), *infra*, § 533.

[2] Re Garnett, 16 Q. B. D. 698.

[3] Gove *v.* Learoyd, 140 Mass. 524.

[4] Osborn *v.* Baxter, 4 Cush. 406; Cleveland *v.* Boerum, 27 Barb. 252; Gray *v.* Heslep, 33 Mo. 238; Holbrook *v.* Coney, 25 Ill. 543.

[5] Doe *v.* Spencer, 3 Bing. 203; Dance *v.* Wyatt, 6 Bing. 486; Lee *v.* Sangster, 2 C. B. N. S. 1; Jones *v.* Yates, 3 Y. & J. 373; Ex parte May, 4 Dea. 60; Casborne *v.* Barsham, 6 Sim. 317; Peircy *v.* Roberts, 1 Myl. & K. 4; Spooner *v.* Payne, 2 De G. & S. 439; Ex parte Wyld, 2 De G. F. & J. 642; Reed *v.* Harvey, 5 Q. B. D. 184; Wilson *v.* Winslow, 145 Mass. 339. See Palmer *v.* Morrison, 104 N. Y. 132; Coombs *v.* Persons, 82 Maine, 326.

[6] Mather *v.* Priestman, 9 Sim. 352; Doe *v.* Evans, 1 C. & M. 450; Tuite *v.* Stevens, 98 Mass. 305; Crowley *v.* Hyde, 116 Mass. 589.

[7] See Abbott *v.* Stearns, 139 Mass. 168; International Tr. Co. *v.* Boardman, 149 Mass. 158.

bona fide purchaser, though they have not recorded it.[1] Their liability as assignees to account in the court of bankruptcy for any failure of duty is another matter.

§ 303. **Rights in Action.** — All actions and rights of action for money, property, damages to property, or penalties vest in the assignees. For instance, a right of entry on land for condition broken;[2] a personal action of tort for waste;[3] an action for a penalty given to the loser at play;[4] a statutory right of action for the purely pecuniary damage by the death of a relative.[5]

§ 304. **Statutory Penalties.** — A statutory penalty for usury goes to the borrower's assignees.[6] *A fortiori* if it be only a right to recover the excess of interest.[7] A few decisions deny this;[8] but they overlook the fact that the penalty is not the *solatium* for a personal injury, but a part of the law of debtor and creditor.

Whether the assignees can, in their turn, assign to a third person this right, or any not ordinarily assignable, is doubtful.[9] Where extraordinary remedies were given the borrower, such as the right to recover his securities without paying the sum actually borrowed, it has been held that the assignees could not avail of them, and that the bankrupt, buying of them, took only their rights.[10] This position seems untenable. The as-

[1] Cole *v.* Coles, 6 Hare, 517; Hall *v.* Whiston, 5 Allen, 126; Merrick *v.* Bragg, 102 Mass. 437; Davis *v.* Anderson, 6 N. B. R. 145, Fed. Cas. No. 3623.

[2] Stearns *v.* Harris, 8 Allen, 597; Smith *v.* Coffin, 2 H. Bl. 444.

[3] Bullock *v.* Hayward, 10 Allen, 460.

[4] Brandon *v.* Pate, 2 H. Bl. 308; Brandon *v.* Sands, 2 Ves. Jr. 514; Carter *v.* Abbott, 1 B. & C. 444; Meech *v.* Stoner, 19 N. Y. 26.

[5] Quin *v.* Moore, 15 N. Y. 432.

[6] Gray *v.* Bennett, 3 Met. 522; Tamplin *v.* Wentworth, 99 Mass. 63; Wheelock *v.* Lee, 15 Abb. Pr. N. S. 24; 64 N. Y. 242; Moore *v.* Jones, 23 Vt. 739; Stevens *v.* Lincoln, 7 Met. 525; Thomas *v.* Watson, Taney, 297, Fed. Cas. No. 13,913; Wright *v.* First Nat. Bank, 8 Biss. 243, Fed. Cas. No. 18,078.

[7] Crocker *v.* Nat. Bank, 4 Dillon, 358, Fed. Cas. No. 3397; Tiffany *v.* Boatman's Inst., 18 Wall. 375.

[8] Nichols *v.* Bellows, 22 Vt. 581; Lafountain *v.* Savings Bank, 56 Vt. 332; Bromley *v.* Smith, 2 Biss. 511, Fed. Cas. No. 1922.

[9] McNeal *v.* Leonard, 1 Allen, 399; Schermerhorn *v.* Talman, 14 N. Y. 93. The case of Miner's Bank *v.* Roseberry, 81 Penn. St. 309, depends upon estoppel. Tufts *v.* Matthews, 10 Fed. Rep. 609.

[10] See Wheelock *v.* Lee, 64 N. Y. 242; Bromley *v.* Smith, 2 Biss. 511, Fed. Cas. No. 1922; Schermerhorn *v.* Talman, 14 N. Y. 93.

signees are the borrowers in respect to all property and rights of action except as hereinafter explained.[1]

§ 305. **Test of Assignability in Bankruptcy.** — Judges and writers have sometimés applied as tests of the title of assignees in bankruptcy to the debtor's rights of action, whether they are such as would survive to an executor; whether they are assignable in equity; whether the damages are compensatory or vindictive. According to these writers, if these questions are answered in the affirmative, they are assignable in bankruptcy, and otherwise not.

The tests are not absolutely accurate, though they represent close analogies. 1. The law of bankruptcy made many things in action asssignable before they were made to survive;[2] and, on the other hand, the modern statutes in some States give survivorship of causes of action which are not assignable in bankruptcy, such as actions for injury to the person. 2. It is safe to say that all causes of action which are assignable at law or in equity except future acquisitions pass by the decree, and therefore we may cite a few such cases to illustrate our position, but there are a few rights held non-assignable, even in equity, by solvent persons, which yet go to assignees in bankruptcy.[3] Expectations may be assigned in equity by way of covenant, or in law by estoppel, which a decree in bankruptcy does not reach.

The true test is whether the right of action is for property or damage to property, on the one hand; or to the feelings or person, on the other. The former go to the assignees, and the latter do not. Actions for damage to property pass, whatever the rule of damages.

§ 306. **Assignees may recover Full Damages.** — The assignees may recover of third persons full damages for breach of a contract with or duty to the bankrupt, though they may be able to pay only a small dividend or none to some other person to whom the bankrupt was responsible in respect to the same

[1] See Secar *v.* Lawson, 15 Ch. D. 426.

[2] See Row & Dawson, 1 White & Tudor's Lead. Cas. Eq., 7th ed., 93.

[3] Compare Prosser *v.* Edmonds, 1 Y. & C. Ex. 481, and Secar *v.* Lawson, 15 Ch. D. 426.

matter;[1] for instance, the assignees of an underwriter may recover the whole of a reinsurance,[2] or full damages for a breach of covenant to pay debts of the bankrupt. So of injury to the property in which the bankrupt had only a special interest and is liable over to a stranger.[3]

If one is bound by a valid contract to pay money to a bankrupt, it is no defence to an action by his assignees that the bankruptcy has deprived the defendant of some expected benefit not amounting to a breach of covenant or technical failure of consideration.[4]

§ 307. **Actions for Damage to Property Vest in the Assignee.** — There were decisions in England that rights of action for trespass to property do not pass;[5] but those decisions cannot be sustained, excepting as they may have depended on points of pleading, or on the ground that the mere possessory right of the bankrupt who was in possession after his bankruptcy was alone involved. Since the elaborate and instructive discussion of the subject in Beckham *v.* Drake,[6] it is held that actions for damage to property, real or personal, vest in the assignees. So do actions for false representations or other deceit sounding in damages; and for maliciously procuring the debtor to be adjudged bankrupt, and this though special damage to the feelings be alleged.[7] So of actions against an attorney for negligence.[8] The right of a defendant to review an action vests in his assignees.[9]

[1] Sullivan *v.* Bridge, 1 Mass. 511; Barstow *v.* Adams, 2 Day, 70.

[2] Herckenrath *v.* Am. Mut. Ins. Co., 3 Barb. Ch. 63; Re Cleveland Ins. Co., 22 Fed. Rep. 200.

[3] Hill *v.* Smith, 12 M. & W. 618; Ashdown *v.* Ingamells, 5 Ex. D. 280. These cases overrule Porter *v.* Vorley, 9 Bing. 93.

[4] Akhurst *v.* Jackson, 1 Swanst. 85; Carey *v.* Nagel, 2 Biss. 244, Fed. Cas. No. 2403; Re West. Ins. Co., 6 Ben. 159, Fed. Cas. No. 17,435.

[5] Brewer *v.* Dew, 11 M. & W. 625; Rogers *v.* Spence, 12 Cl. & Fin. 700, 11 M. & W. 191, 13 M. & W. 571.

[6] 2 H. of L. 579.

[7] Metropolitan Bank *v.* Pooley, 10 App. Cas. 210; Warder *v.* Saunders, 10 Q. B. D. 114; Wetherell *v.* Julius, 10 C. B. 267; Stanton *v.* Collier, 3 E. & B. 274; Ouchterlony *v.* Gibson, 5 M. & G. 579; Hodgson *v.* Sidney, L. R. 1 Ex. 313; Morgan *v.* Steble, L. R. 7 Q. B. 611; Wadling *v.* Oliphant, 1 Q. B. D. 145. But see Tufts *v.* Matthews, 10 Fed. Rep. 609; Byxbie *v.* Wood, 24 N. Y. 607.

[8] Re Daines, 16 L. T. N. S. 127; Crauford *v.* Cinnamond, Irish R. 1 C. L. 325.

[9] Zollar *v.* Janvrin, 49 N. H. 114.

§ 308. **Assignees are like Judgment Creditors.** — The saying of Lord Hardwicke that the assignment in bankruptcy is a statutory execution in favor of all the creditors has been often quoted and suggests a useful analogy. The assignees are like judgment creditors, and have all the right of such creditors at law and in equity;[1] and like them they take subject to all valid liens and incumbrances.[2] If, however, there is any sort of equitable right or chose in action which even judgment creditors cannot reach, it passes to the assignees if the debtor could assign it.[3]

§ 309. **Unrecorded Deeds.** — The assignees are bound by an unrecorded deed of land, because registration is not necessary as to purchasers with notice.[4] Some of the States have statutes by which unrecorded mortgages of chattels are not good even against persons having actual notice. Under these laws it has been held that such mortgages are not valid against assignees.[5] But recent decisions of the Supreme Court have sustained such titles, on the broad ground that excepting in cases of actual fraud the assignees are the bankrupt.[6] The apparent conflict of decisions may be reconciled to some extent by the difference in the statutes which deal with mortgages, some of

[1] Re Duncan, 14 N. B. R. 18, Fed. Cas. No. 4131; Re Leland, 10 Blatch. 503, Fed. Cas. No. 8234; Platt *v.* Matthews, 10 Fed. Rep. 280; Southard *v.* Benner, 72 N. Y. 424; Kruger *v.* Wilcox, Amb. 252; Brown *v.* Heathcote, 1 Atk. 160; Taylor *v.* Plumer, 3 M. & S. 562.

[2] Mitford *v.* Mitford, 9 Ves. 87; Grant *v.* Mills, 2 V. & B. 306; Ex parte Coppard, 4 Dea. & Ch. 102; Mitchell *v.* Winslow, 2 Story, 630, Fed. Cas. No. 9673; Cook *v.* Tullis, 18 Wall. 332; Hauselt *v.* Harrison, 105 U. S. 401; Ratcliff *v.* Sangston, 15 Md. 391; Plume Co. *v.* Caldwell, 136 Ill. 163; Longdale *v.* Swift, 91 Ky. 191; Peterborough Bank *v.* Hartshorn, 33 Atl. Rep. 729 (N. H.); Helm *v.* Gilroy, 20 Ore. 517; Re McKay, 1 N. B. N. 133.

[3] *Supra*, §§ 301, 303, 304.

[4] Stewart *v.* Platt, 101 U. S. 731; Hardin *v.* Osborne, 94 Ill. 571; Laughlin *v.* Calumet Dock Co., 65 Fed. Rep. 441.

[5] Leavenworth Bank *v.* Hunt, 11 Wall. 391; Bank of Alexandria *v.* Herbert, 8 Cranch, 36; Edmondson *v.* Hyde, 2 Sawyer, 205, Fed. Cas. No. 4285; Bingham *v.* Jordan, 1 Allen, 373.

[6] See Stewart *v.* Platt, 101 U. S. 731; Donaldson *v.* Farwell, 93 U. S. 631; Jerome *v.* McCarter, 94 U. S. 734; Gibson *v.* Warden, 14 Wall. 244; Cook *v.* Tullis, 18 Wall. 332; Mitchell *v.* Winslow, 2 Story, 630; Fed. Cas. No. 9673; Lloyd *v.* Foley, 6 Sawyer, 424; Johnson *v.* Patterson, 2 Woods, 443, Fed. Cas. No. 7403; Ex parte Dalby, 1 Lowell, 431, Fed. Cas. No. 3540; Coggeshall *v.* Potter, Holmes, 75, Fed. Cas. No. 2955.

which may make registration absolutely essential to their validity for any purpose; others make recording a condition precedent to the existence of an incumbrance, such as a mechanic's lien. In such cases an unrecorded title is not good even against assignees in bankruptcy.[1] But the interposition of a decree in bankruptcy will not invalidate a lien recorded within the statutory time.[2] Even in Massachusetts, where it was held that unrecorded mortgages of chattels are not binding on assignees in insolvency,[3] the contrary rule prevails as to unrecorded transfers of shares, and goods sold but not delivered.[4]

§ 310. **Subject to Equities.** — As early as the year 1742 Chief Justice Willes, in Scott *v.* Surman,[5] expressed the opinion that even at law nothing vested in the assignees excepting that in which the bankrupt was beneficially interested. He said that his associates did not agree with him, and the case was decided upon another point; but his opinion has prevailed, and equitable defences have ever since been admitted in actions at law brought by assignees, though in actions between other persons it was for some three-quarters of a century after 1742 necessary to file a bill to establish such defences. It became an accepted aphorism that assignees, when plaintiffs at law, must have both the legal and the equitable title; and many eminent judges have expressed their concurrence in this equitable rule.[6]

§ 311. **Property held by Bankrupt in Trust.** — The assignees take nothing which the bankrupt held in trust as executor, trustee, assignee, or otherwise, or as agent or consignee; but as they are entitled to everything of which he had the beneficial

[1] Moss *v* Charnock, 2 East, 399; Bloxam *v.* Hubbard, 5 East, 407; Ex parte Neilson, 3 DeG. M. & G. 556.

[2] Clifton *v.* Foster, 103 Mass. 233; Re Coulter, 2 Sawyer, 42, Fed. Cas. No. 3276.

[3] Bingham *v.* Jordan, 1 Allen, 373.

[4] Dickinson *v.* Central Bank, 129 Mass. 279; Dugan *v.* Nichols, 125 Mass. 43; Sibley *v.* Quinsigamond Bank, 133 Mass. 515. [And so of an unrecorded deed of land. Smythe *v.* Sprague, 149 Mass. 310.]

[5] Willes, 400; see L'Apostre *v.* Le Plaistrier, cited 1 P. Wms. 318.

[6] See remarks in Mitford *v.* Mitford, 9 Ves. 87; Tatham *v.* Andree, 1 Moore P. C. N. S. 386, 410; Fleeming *v.* Howden, L. R. 1 Sc. App. 372, 380; Cowden *v.* Pleasants, 9 Penn. St. 59; Gibson *v.* Warden, 14 Wall. 244, and the decision in Garry *v.* Sharratt, 10 B. & C. 716.

ownership, so they can take nothing of which the beneficial ownership is in others.[1]

Even if creditors can by process of law attach and hold land or shares standing in the name of the bankrupt, if they have no knowledge that he is not the true owner, this right or power does not pass to the assignees, for they take with notice.[2] If the Statute of Frauds requires all trusts of land to be evidenced by writing, it seems to be the better opinion that the bankrupt may declare the trust after the date to which the title of his assignees relates.[3]

§ 312. **Property held by Bankrupt in Secret Trust.** — It has been ruled that if a bankrupt holds the legal title to property on a secret trust for his grantor, in fraud of the creditors of the grantor, he should put the property into his inventory and surrender it to his assignees.[4] But this may be doubted. It is true that the trust is illegal, but it is nevertheless a trust, and by operation of law a trust for the creditors of a third person. Even if no such creditors appear, the grantee has no equitable interest in the property, and is bound by that honor which is said to exist even with thieves to return it to its former owner.[5] In one case it was held that when the assignees in bankruptcy of such a grantee have obtained possession of the property, their equity is equal to that of judgment creditors of the fraudulent grantors, and therefore that the first in possession is the first in right. This, too, is to be doubted.[6]

§ 313. **Assignees bound by Completed Bargains of the Debtor.** — The assignees are bound by all the debtor's completed bargains, by his representations and estoppels. For instance, if he

[1] Ontario Bank *v.* Mumford, 2 Barb. Ch. 596; Pratt *v.* Wheeler, 6 Gray, 520; Gladstone *v.* Hadwen, 1 M. & S. 517; Scott *v.* Surman, Willes, 400; Winch *v.* Keeley, 1 T. R. 619; Dangerfield *v.* Thomas, 9 A. & E. 292; Ex parte Gennys, Mont. & McA. 258; Ex parte Armitstead, 2 Gl. & J. 371; Thompson *v.* Giles, 2 B. & C. 422; Nutter *v.* Wheeler, 2 Lowell, 346, Fed. Cas. No. 10,384; Holmes *v.* Winchester, 133 Mass. 140; Low *v.* Welch, 139 Mass. 33

[2] See Heritable Reversionary Co. *v.* Millar (1892), A. C. 598, and cases cited at the argument.

[3] Gardner *v.* Rowe, 5 Russ. 258.

[4] Re O'Bannon, 2 N. B. R. 15, Fed. Cas. No. 10,394.

[5] Harrison *v.* Walker, Peake N. P. 111; Gibbs *v.* Chase, 10 Mass. 125.

[6] Aiken *v.* Edrington, 15 N. B. R. 271, Fed. Cas. No. 111.

has represented or agreed that he resided in a certain place;[1] that certain fixtures are chattels;[2] that certain goods have been paid for;[3] that directors of an insolvent company, with whom the plaintiff dealt, had been duly chosen;[4] that a chattel had been delivered;[5] so if he has given an acknowledgment to take a debt out of the Statute of Limitations;[6] has suffered a judgment to be irregularly entered against him.[7] In these and similar cases the assignees are bound if the waiver, estoppel, or laches would be binding on the bankrupt himself under the circumstances;[8] with the single condition that the situation shall not have been contrived between the parties to give the creditor a preference in bankruptcy.

§ 314. **Secret Liens.** — In the absence of fraud, a secret lien, valid in law, equity, or admiralty, holds good against assignees in bankruptcy.[9] Great loss is often suffered by the general creditors from the operation of this rule; but the remedy is to be found in statutes requiring publicity to be given to liens, rather than in depriving innocent persons of the fruits of their diligence. A latent trust in land, that is, one which has not been recorded, was held by the House of Lords to prevent the land from passing to the assignees.[10] And a bankrupt's declaration of trust after the time to which the assignees' title related was held good, if the fact of the trust were proved.[11]

§ 315. **Property conveyed in Fraud.** — Most of the statutes on the subject of bankruptcy expressly vest in the assignees all property conveyed or disposed of by the bankrupt in fraud

[1] Allen *v.* Whittemore, 8 Ben. 485, Fed. Cas. No. 241.

[2] Ex parte Ames, 1 Lowell, 561, Fed. Cas. No. 323.

[3] Harris *v.* Truman, 7 Q. B. D. 340, 9 Q. B. D. 264. See People *v.* City Bank, 96 N. Y. 32.

[4] Mahony *v.* East Holyford Co, L. R. 7 H. L. 49; Middleton *v.* Pollock, 4 Ch. D. 49.

[5] Re Rockford R. R. Co., 1 Lowell, 345, Fed. Cas. No. 11,978.

[6] Ex parte Wilson, 1 M. D. & De G. 586; Ex parte Fairman, 3 Dea. 467; Mont. & Ch. 125.

[7] Charlesworth *v.* Ellis, 7 Q. B. 678.

[8] See Ex parte Reay, 3 D. & Ch. 175; Jenkins *v.* Armour, 14 N. B. R. 276, Fed. Cas. No. 7260; Cook *v.* Sherman, 20 Fed. Rep. 167.

[9] In Bayley *v.* Greenleaf, 7 Wheat. 46, Marshall, C. J., doubts the universality of this rule, but it is now well settled.

[10] Heritable Reversionary Co. *v.* Millar (1892), A. C. 598.

[11] Gardner *v.* Rowe, 5 Russ. 258.

of his creditors; and whether expressed or not, they will have the right to set aside such conveyances. "A deed," said Baron Parke, "which is void as against creditors, is void also as against those who represent creditors."[1] So Mr. Justice Curtis: "Their [creditors'] remedy is absorbed in the great and comprehensive remedy under the commission."[2]

§ 316. **Assignees may avoid any Deed which Creditors could avoid.** — Any act, deed, or transaction, therefore, which is voidable by creditors by the law of the debtor's residence, may be avoided by his assignees, whether it was made or done before or after the bankrupt law was passed.[3] Where the bankrupt act itself creates the fraud, its language may be such as to limit the power of the assignees; as where the statute used the word "convey,"[4] it was limited to conveyances by deed, and where it spoke only of preferences by gift and transfer, a payment of money, or the creation of a lien or charge, were not voidable. But whatever is fraudulent under any general law or under the bankrupt law may be avoided by the assignees, though creditors could not have maintained a bill without first obtaining judgment at law.[5]

§ 317. **Assignees' Right exclusive.** — This right of the assignees to set aside frauds is exclusive of the right of the

[1] Doe *v.* Ball, 11 M. & W. 531.

[2] Carr *v.* Hilton, 1 Curtis C. C. 230, Fed. Cas. No. 2436.

[3] Martin *v.* Pewtress, 4 Burr. 2477; Butcher *v.* Harrison, 4 B. & Ad. 129; Sands *v.* Codwise, 4 Johns. Ch. 536; Bank of Alexandria *v.* Herbert, 8 Cranch, 36; Englebert *v.* Blanjot, 2 Whart. 240; Waters *v.* Dashiell, 1 Md. 455; Atkinson *v.* Phillips, 1 Md. Ch. 507; Carr *v.* Hilton, 1 Curtis C. C. 230, Fed. Cas. No. 2436; Norcutt *v.* Dodd, Cr. & P. 100; Doe *v.* Ball, 11 M. & W. 531; Gibbs *v.* Thayer, 6 Cush. 30; Bank of Leavenworth *v.* Hunt, 11 Wall. 391; Re Wynne, 4 N. B. R. 23, Fed. Cas. No. 18,117; Bradshaw *v.* Klein, 2 Biss. 20, Fed. Cas. No. 1790; Allen *v.* Massey, 1 Dillon, 40, Fed. Cas. No. 231; 17 Wall. 351; Re Meyers, 2 Ben. 424, Fed. Cas. No. 9518; Edmondson *v.* Hyde, 2 Sawyer, 205, Fed. Cas. No. 4285; Knowlton *v.* Moseley, 105 Mass. 136; Re Duncan, 14 N. B. R. 18, Fed. Cas. No. 4131; Southard *v.* Benner, 72 N. Y. 424; Re Leland, 10 Blatch. 503, Fed. Cas. 8234; Pratt *v.* Curtis, 2 Lowell, 87, Fed. Cas. 11,375; Platt *v.* Matthews, 10 Fed. Rep. 280; Pittsburg Carbon Co. *v.* McMillin, 119 N. Y. 46; Act of 1898, § 70 e, *infra*, § 533.

[4] Martin *v.* Pewtress, 4 Burr. 2477; Clavey *v.* Hayley, Cowp. 427; Smith *v.* Hodson, 4 T. R. 211; Livermore *v.* Bagley, 3 Mass. 487; Dutton *v.* Morrison, 17 Ves. 193.

[5] Platt *v.* Matthews, 10 Fed. Rep. 280; Re Duncan, 14 N. B. R. 18, Fed. Cas. No. 4131; Southard *v.* Benner, 72 N. Y. 424; Dudley *v.* Easton, 104 U. S. 99, 103, per *Waite, C. J.*

creditors themselves and overrides it. In frauds against the bankrupt law itself, it is plain that if such a fraud, for instance, a preference, has been committed, it is inchoate until bankruptcy, and that to set aside a preference to one creditor at the suit of another is merely to substitute one preference for another. It is now entirely settled that a preference or other fraud upon the bankrupt law can be avoided only by the assignees.[1]

It is equally true, though not so readily perceived, that after a decree in bankruptcy the assignees are the only persons who can avoid acts which are fraudulent under the general laws.[2] Charges by creditors that the assignees will not prosecute, or even that they are in collusion with the debtor, are of no avail, because there are easy and direct remedies for such a state of things by obtaining from the court of bankruptcy leave for creditors to sue in the name of the assignees, or in extreme cases by removing them and appointing others.[2] That a special

[1] Holbird *v.* Anderson, 5 T. R. 235; Ingliss *v.* Grant, ib. 530; Meux *v.* Howell, 4 East, 1; Carr *v.* Acraman, 11 Ex. 566; Johnson *v.* Osenton, L. R. 4 Ex. 107; Dodge *v.* Sheldon, 6 Hill, 9; Atkins *v.* Spear, 8 Met. 496; Penniman *v.* Cole, 8 Met. 496; Burt *v.* Perkins, 9 Gray, 317; Seaman *v.* Stoughton, 3 Barb. Ch. 344; Maltbie *v.* Hotchkiss, 38 Conn. 80; Gardner *v.* Lane, 9 Allen, 492; National Mechanics' & Traders' Bank *v.* Eagle Sugar Refinery, 109 Mass. 38, (explaining several earlier cases in Massachusetts which seemed to be inconsistent with the true rule); Fenlon *v.* Lonergan, 29 Penn. St. 471; Shryock *v.* Basehore, 82 Penn. St. 159; Bourne *v.* Buffington, 125 Mass. 481; Bromley *v.* Goodrich, 40 Wis. 131; Talcott *v.* Harder, 119 N. Y. 536. See Act of 1898, § 60 b, *infra*, § 523.

[2] Spragg *v.* Binkes, 5 Ves. 583; Benfield *v.* Solomons, 9 Ves. 77; Saxton *v.* Davis, 18 Ves. 72; Hammond *v.* Attwood, 3 Mad. 158; Kaye *v.* Fosbrooke, 8 Sim. 28; Yewens *v.* Robinson, 11 Sim. 105; Heath *v.* Chadwick, 2 Ph. 649; Major *v.* Aukland, 3 Hare, 77; Ex parte Ryland, 2 Dea. & Ch. 392; Davis *v.* Snell, 28 Beav. 321; 2 De G. F. & J. 463; Re Meiklam, 12 W. R. 442; Ex parte Osborne, ib. 722; Collins *v.* Burton, 4 De G. & J. 612; Dyson *v.* Hornby, 7 De G. M. & G. 1; Glenny *v.* Langdon, 98 U. S. 20; Trimble *v.* Woodhead, 102 U. S. 647; Freelander *v.* Holloman, 9 N. B. R. 331, Fed. Cas. No. 5081; Jamison *v.* Chesnut, 8 Md. 34; Thomas *v.* Phillips, 9 Penn. St. 355; King *v.* Dietz, 12 Penn. St. 156; Moncure *v.* Hanson, 15 Penn. St. 385; Beck *v.* Parker, 65 Penn. St. 262; Allen *v.* Montgomery, 48 Miss. 101; Hubbard *v.* Lyman, 8 Allen, 520; Pomroy *v.* Lyman, 10 Allen, 468; Williams *v.* Merritt, 103 Mass. 184; Cook *v.* Rogers, 31 Mich. 391; McMaster *v.* Campbell, 41 Mich. 513; McCabe *v.* Cooney, 2 Sandf. Ch. 314; David *v.* Ferrand, 2 La. An. 596; Re Meyers, 2 Ben. 424, Fed. Cas. No. 9518; Olney *v.* Tanner, 18 Fed. Rep. 636; Re Lowe, 19 Fed. Rep. 589; Fogg *v.* Lawry, 71 Maine, 215; Frost *v.* Libby, 79 Maine,

Statute of Limitations has barred an action by the assignees does not revive the right of action for creditors.[1]

The mistake has sometimes been made of supposing that the validity or invalidity of such suits was dependent upon the discharge of the debtor. It is not the bankruptcy or discharge, but the exclusive title of the assignees, which supersedes the remedies of creditors; and an important case was lost in the Supreme Court by the omission of the defendants to allege that an assignee had been appointed.[2]

§ 318. **All Kinds of Property vest in the Assignee.** — All rights, licenses, and franchises which are in the nature of property, and which the law permits to be assigned, under whatever limitations, conditions, or restrictions, go to the assignees, subject to those restrictions; as franchises of a ferry or railroad,[3] a license to keep a stall in a market, a seat in a stock board, and other similar franchises,[4] subject to any valid by-laws giving the corporation or its members a lien for the debts of the owner contracted with them.[5]

If the consent of a corporation or of the Legislature is essential to the validity of a transfer, the courts will presume that the right will be reasonably exercised, and the assignees may transfer the interest of the bankrupt *toties quoties* until the consent is obtained, and a corporation will be required to transfer the bankrupt's shares to his assignees, though the by-laws require a certain form of transfer which cannot be obtained from the bankrupt.[6]

56; Dorrance *v.* Henderson, 92 N. Y. 406; Spring *v.* Short, 90 N. Y. 538; Crouse *v.* Frothingham, 97 N. Y. 105; Loos *v.* Wilkinson, 110 N. Y. 195.

[1] Trimble *v.* Woodhead, 102 U. S. 647.

[2] Moyer *v.* Dewey, 103 U. S. 301. The opinion of the Court of Appeals of New York was not followed in the Supreme Court, though the decision was sustained on the pleadings: see s. c. 9 Hun, 473; 72 N. Y. 70.

[3] New Orleans R. R. Co. *v.* Delamere, 114 U. S. 501.

[4] Re Gallaher, 19 N. B. R. 224, Fed. Cas. No. 5197; Re Ketchum, 1 Fed. Rep. 840; Platt *v.* Jones, 96 N. Y. 24; Re Warder, 10 Fed. Rep. 275; Re Warder, 15 Fed. Rep. 789 [overruling Re Sutherland, 6 Biss. 526, Fed. Cas. No. 13,637]; Powell *v.* Waldron, 89 N. Y. 328.

[5] Hyde *v.* Woods, 94 U. S. 523.

[6] See note 2, and Wilson *v.* Atlantic & St. L. R. R. Co., 2 Fed. Rep. 459; Re Staib, 3 Fed. Rep. 209; Ex parte Butler, 1 Atk. 210; Platt *v.* Jones, 96 N. Y. 24.

Patent-rights and copyrights and similar incorporeal statutory titles pass by the decree.[1] But the trustees have no interest in an unpatented invention, or in an author's unused manuscript, because it is within the personal discretion of the inventor or author whether it shall be given to the world.[2]

§ 319. **Good-will of a Business.** — The good-will of a business has been said to be the value of the probability that the old customers will resort to the old place.[3] The good-will of a business has been assumed and understood to pass to the assignees.[4] In several of the statutes in England since 1861 it is expressly mentioned as vesting in them. Trustees cannot covenant for the bankrupt, and though they may dispose of the good-will neither they nor their grantee can prevent the bankrupt from carrying on the old business in his own name and soliciting the old customers;[5] though they may enjoin him from representing that he owns the local good-will.[6]

If one member of a firm is bankrupt the solvent partners have the right to continue the business, but they cannot use the bankrupt's name without his consent.

§ 320. **Trade Marks.** — Similar principles apply to trade marks. If a trade mark has become a symbol denoting merely quality, it is assignable, and is assigned by the decree; and so of the right to publish a newspaper by a particular title,[7] though if the trade mark is significant of the business of a certain person or firm it cannot be transferred excepting with the business.[7] But a trade mark which is personal and represents that

[1] Mawman *v.* Tegg, 2 Russ. 385; Drone, Copyright, pp. 315, 322; Barton *v.* White, 144 Mass. 281; Act of 1898, § 70 a, *infra*, § 533.

[2] Slater on Copyright, 163.

[3] Cruttwell *v.* Lye, 17 Ves. 336, 1 Rose, 123.

[4] Chissum *v.* Dewes, 5 Russ. 29; Ex parte Thomas, 2 M. D. & De G. 294, per *Cross, J.*; Ex parte Punnett, 16 Ch. D. 226; Cruttwell *v.* Lye, 17 Ves. 336; Walker *v.* Mottram, 19 Ch. D. 355, 363, per *Baggallay, L. J.*

[5] Johnson *v.* Helleley, 2 De G. J. & S. 446; Cruttwell *v.* Lye, 17 Ves. 336, 1 Rose, 123; Cook *v.* Collingridge, Jac. 607; Hembold *v.* Hembold, 53 How. Pr. 453; Ginesi *v.* Cooper, 14 Ch. D. 596, per *Jessel, M. R.*; Walker *v.* Mottram, 19 Ch. D. 355.

[6] See Hudson *v.* Osborne, 21 L. T. N. S. 386: Leggott *v.* Barrett, 15 Ch. D. 306; Walker *v.* Mottram, 19 Ch. D. 355; Wotherspoon *v.* Currie, L. R. 5 H. L. 508; Thorley's Cattle Food Co. *v.* Massam, 14 Ch. D. 763; Churton *v.* Douglas, Johns. 174.

[7] Filkins *v.* Blackman, 13 Blatch. 440, Fed. Cas. No. 4786; Pepper *v.* Labrot, 8 Fed. Rep. 29; Warren *v.* Warren

a particular individual devotes his skill to the business or manufacture cannot be assigned.[1] If the symbolic trade mark is assigned, the bankrupt cannot afterwards use it without the consent of the assignees, though his own name is a part of it. Assignments by act of the party without covenants are analogous and some of the decisions cited below refer to such assignments.[2]

§ 321. **Claims on a Government.** — The notion that claims upon a sovereign government incapable of enforcement in a court are not property, and therefore not assignable,[3] is exploded. The law is that such claims if they are assignable in their nature, such as claims for damage to property, will vest in the assignees,[4] and the subsequent acknowledgment by the government will be, not a gratuity, but the recognition of a right. Even if the claim be in its nature illegal, as where money was advanced in breach of the neutrality laws, the assignment will be valid.[5]

A statute declares that no claim against the United States shall be assigned until after its allowance and after a warrant

Thread Co., 134 Mass. 247; Hudson *v.* Osborne, 21 L. T. N. S. 386; Longman *v.* Tripp, 2 B. & P. N. R. 67; Ex parte Foss, 2 De G. & J. 230; Hall *v.* Barrows, 4 De G. J. & S. 150; Bury *v.* Bedford, 4 De G. J. & S. 352; Leather Cloth Co. *v.* Am. Cloth Co., 4 De G. J. & S. 137, 11 H. of L. 523; Hoxie *v.* Chaney, 143 Mass. 592; Chadwick *v.* Covell, 151 Mass. 190; Skinner *v.* Oakes, 10 Mo. App. 45; Hazelton Boiler Co. *v.* Tripod Boiler Co., 142 Ill. 494; Richmond Nervine Co. *v.* Richmond, 159 U. S. 293; Stachelberg *v.* Ponce, 23 Fed. Rep. 430.

[1] Pearce *v.* Farr, 3 Mad. 74; Austen *v.* Boys, 2 De G. & J. 626; Carmichel *v.* Latimer, 11 R. I. 395.

[2] See note 7, page 233.

[3] Campbell *v.* Mullett, 2 Swanst. 551; Vasse *v.* Comegys, 4 Wash. C. C. 570, Fed. Cas. No. 16,893.

[4] Comegys *v.* Vasse, 1 Pet. 193; Duncan *v.* Duboys, 3 Johns. Cas. 125; Hunter *v.* United States 5 Pet. 173; Plater *v.* Scott, 6 Gill & J. 116; Milner *v.* Metz, 6 Pet. 221; McBlair *v.* Gibbes, 17 How. 232; Clark *v.* Clark, 17 How. 315; Couch *v.* Delaplaine, 2 Comst. 397; McKee *v.* Judd, 12 N. Y. 622; Byxbie *v.* Wood, 24 N. Y. 607; North *v.* Turner, 9 S. & R. 244, per *Gibson, C. J.*; Farnam *v.* Brooks, 9 Pick. 212, 241, per *Parker, C. J.*; Erwin *v.* United States, 13 Ct. Claims 49, 97 U. S. 392; Phelps *v.* McDonald, 99 U. S. 298; Leonard *v.* Nye, 125 Mass. 455; Williamson *v.* Colcord, 13 N. B. R. 319, Fed. Cas. No. 17,752; Burke *v.* United States, 13 Ct. Cl. 231; Bachman *v.* Lawson, 109 U. S. 659; Crawford *v.* Cinnamond, 15 W. R. 996; Re Young, 12 W. R. 537; Chandler *v.* Gardiner, cited 17 Ves. 343; Goodwin *v.* Robarts, 1 App. Cas. 476; Randal *v.* Cockran, 1 Ves. Sen. 98; Blaauwpot *v.* Da Costa, 1 Eden, 130.

[5] See Mayer *v.* White, 24 How. 317; Gill *v.* Oliver, 11 How. 529; McBlair *v.* Gibbes, 17 How. 232.

has been issued for its payment.[1] This is intended for the convenience of the United States and does not prevent the claim from vesting in the assignees.[2]

§ 322. **Alabama Claims.** — The settlement of what were called the Alabama Claims gave rise to several interesting decisions. The tribunal of arbitration between the United States and Great Britain provided for by the treaty of Washington,[3] awarded and Great Britain paid to the United States £3,100,000 for injury done to the property of American citizens by certain specified cruisers; and Congress in 1874 established a court to decide upon the claims of these citizens.[4] It was held that these claims passed by a general assignment, such as a decree in bankruptcy, made at any time after the injury, though before either the treaty or act of Congress were in existence.[5]

By the statute of 1874 it was declared that persons who had been insured should receive compensation only for the amount of any loss which they had sustained above the amount of insurance money paid them, and that no insurance company or insurer should receive anything excepting when he or they had paid for losses by the cruisers more than had been received for premiums on such risks.

It was held that where an owner who had been paid by the underwriters the full amount of a valued policy had received a further sum from the Alabama fund, the underwriters were not subrogated to his right and could not require him to pay the amount to them.[6]

In 1882, Congress authorized the Court of Alabama Claims to award payments for losses and expenses, such as war premiums which had been expressly rejected by the arbitrators at Geneva.[7]

The question whether sums awarded by virtue of this statute would pass by a previous assignment was much

[1] Rev. Sts. U. S. § 3477.
[2] Hobbs *v.* McLean, 117 U. S. 567.
[3] See 17 Stats. 863.
[4] Stat. 23d June, 1874, 18 Stats. 245.
[5] Williamson *v.* Colcord, 13 N. B. R. 319, Fed. Cas. No. 17,752; Leonard *v.* Nye, 125 Mass. 455; Bachman *v.* Lawson, 109 U. S. 659.
[6] Burnand *v.* Rodocanachi, 7 App. Cas. 333; s. c. 5 C. P. D. 424; 6 Q. B. D. 633.
[7] Act of June 5, 1882, 22 Stats. 98.

debated. Several courts answered this question in the negative, on the ground that claims which had been rejected at Geneva had no standing whatever, and that their recognition by Congress was purely gratuitous.[1] Able and learned judges, on the other hand, were of opinion that the claims being for property destroyed, were in the nature of property and capable of assignment, and this was the decision of the final court of appeal.[2] That they would pass by the residuary clause of an earlier will was twice decided in Maine.[3] In Massachusetts it was said that executors are universal successors and that whatever comes to them as executors must be treated as having belonged to their testators.[4] The reasoning of the courts in Maine did not rest upon this distinction. It was strongly intimated in Heard *v.* Sturgis[5] that an assignment of a claim after the Act of Congress had been passed would be valid. In England it was said that even a gift made by the government to an insured person to atone for a seizure might pass to the underwriter by subrogation.[6]

§ 323. **Money given on a merely Moral Claim.** — If the bankrupt have a merely moral claim upon a private person or upon a government, its subsequent recognition will be considered a gift, and assignees whose title antedates the gift will take nothing. Instances are: a grant to an officer for services which, though of unusual merit or labor, were within the line of his duty,[7] a claim against a brother for a share of the father's estate "on moral grounds,"[8] an agreement by a company with a third person, to which the bankrupt was not a party, to make him certain allowances,[9] a waiver after bankruptcy of a forfeiture incurred before,[10] and all other gifts and gratuities to the bankrupt pending or after his bankruptcy though the

[1] Brooks *v.* Ahrens, 68 Md. 212; Taft *v.* Marsily, 47 Hun, 175; Heard *v.* Sturgis, 146 Mass. 545; reversed, Williams *v.* Heard, 140 U. S. 529.

[2] Williams *v.* Heard, 140 U. S. 529.

[3] Grant *v.* Bodwell, 78 Maine, 460; Pierce *v.* Stidworthy, 79 Maine, 234.

[4] Per *Holmes, J.*, in Heard *v.* Sturgis, 146 Mass. 545, 552.

[5] Per *Holmes, J.*, 146 Mass. 548, and in Goreley *v.* Butler, 147 Mass. 8, 11.

[6] See remarks in Burnand *v.* Rodocanachi, 7 App. Cas. 333.

[7] Emerson *v.* Hall, 13 Pet. 409.

[8] Tallman *v.* Tallman, 5 Cush. 325.

[9] Ex parte Piercy, L. R. 9 Ch. 33.

[10] Kittridge *v* McLaughlin, 33 Maine, 327.

decree may in the most sweeping terms convey all his property or income.[1]

§ 324. **Pensions; Retired Pay.** — The general rule is that pensions or retired pay granted to public servants are assignable, if they are merely annuities for past services, but if they are given, in part, in consideration of a right to call for further services if occasion requires, they are not;[2] though it is said that accumulated arrears of pay may be assigned.[3] The subject is usually regulated by statute, which of course overrides this rule.[4] Pensions granted by colleges and other *quasi* private corporations are assignable.[5]

In the United States, pensions to soldiers and sailors are, by statute, inalienable.[6] Nothing is provided as to the pensions of retired judges.[7] These two classes comprise all the pensions granted by the United States. Prize money is not pay or half pay and is assignable, before as well as after it is actually awarded.[8] If a statutory prohibition against assignment of claims upon the government is intended merely for the protection and convenience of the officers of the treasury an assignment is good as to other parties.[9]

§ 325. **Personal Actions.** — There are some causes of action of a peculiarly personal nature, which are not assignable, even by a decree in bankruptcy. A learned judge explains these exceptional cases by the consideration "that it would in many cases be attended with extremely harsh and unjust consequences if the discretion, as to whether a redress for wrongs

[1] Wills *v.* Wells, 8 Taunt. 264; Ex parte Wicks, 17 Ch. D. 70; Gillan *v.* Gillan, 55 Penn. St. 430; Ex parte Webber, 18 Q. B. D. 111.

[2] 2 Story, Eq., 13th ed., § 1040 *e*; Oliver *v.* Emsonne, Dyer, 1 *b*; York *v.* Twine, Cro. Jac. 78; Wells *v.* Foster, 8 M. & W. 149; Spooner *v.* Payne, 1 De G. M. & G. 383; s. c. 18 L. J., Ex. 401; McCarthy *v.* Goold, 1 Ball. & B. 387; Ellis *v.* Earl Grey, 6 Sim. 214; Knight *v.* Bulkeley, 5 Jur. N. S. 817; Ex parte Huggins, 21 Ch. D. 85; Heald *v.* Hay, 3 Giff. 467; Carew *v.* Cooper, 4 Giff. 619.

[3] See Ellis *v.* Earl Grey, 6 Sim. 214; Tunstall *v.* Boothby, 10 Sim. 542; 2 Story, Eq., 13th ed., § 1040 *f*.

[4] See Robson, 7th ed. p. 482.

[5] Harrington *v.* Kloprogge, 2 Brod. & B. 678.

[6] R. S. § 4745.

[7] R. S. § 714.

[8] Alexander *v.* Wellington, 2 Russ. & M. 35.

[9] See Lawrence *v.* U. S., 8 Ct. Claims R. 252; Williamson *v.* Colcord, 13 N. B. R. 319, 328, Fed. Cas. No. 17,752.

of this nature should be sought, was to be intrusted to any one but the very person who has received the injury."[1]

For these reasons, a right to damages for libel or slander, for seduction of a wife or daughter, and for injuries to the debtor's person, whether from assault or from a breach of a carrier's contract, or of that of a physician, does not pass to the assignees.[2]

§ 326. **Judgments in Personal Actions.** — If, however, before bankruptcy any of these personal demands have been liquidated by contract, judgment or award, they become debts which vest by the decree.[3] But where assignees were entitled to after-acquired property, as we shall see that they are in England in certain cases, it was held that they could not require a verdict obtained by the bankrupt for such injuries, to be paid to them.[4] The personal right which an infant has to avoid certain acts and deeds does not vest in his assignees.[5]

§ 327. **Possibilities.** — Mere expectancies, sometimes called possibilities, will not vest in the assignees; such as the chance of being heir to a living person;[6] the possibility that an option or power of appointment will be exercised, if vested in a third person, though it be the wife of the bankrupt;[7] so of an inchoate right of curtesy in a (vested) remainder;[8] but in Massachusetts before the late married women's acts, the husband's equitable right in a vested remainder passed, subject to the

[1] Per *Williams, J.*, Beckham *v.* Drake, 2 H. of L. 579, 597.

[2] Benson *v.* Flower, W. Jones, 215; Langford *v.* Ellis, 14 East, 202 n.; Howard *v.* Crowther, 8 M. & W. 601; Ex parte Graham, 21 L. T. N. S. 802; Dillard *v.* Collins, 25 Gratt. 343; People *v.* Tioga, 19 Wend. 73; Stone *v.* Boston and Maine R. R., 7 Gray, 539; Rice *v.* Stone, 1 Allen, 566; Re Crockett, 2 N. B. R. 208, Fed. Cas. 3402; Re Brick, 4 Fed. Rep. 804. See McClurg *v.* State Bindery Co., 3 So. Dak. 362; Re Haensell, 91 Fed. Rep. 355. Under the act of 1898 actions for damage to property pass to the trustee, § 70 a 16. See *infra*, § 533.

[3] See remarks of the judges in Rice *v.* Stone, 1 Allen, 566, and in Beckham *v.* Drake, 2 H. of L. 579.

[4] Ex parte Vine, 8 Ch. D. 364.

[5] Mansfield *v.* Gordon, 144 Mass. 168.

[6] Moth *v.* Frome, Amb. 394; Jones *v.* Roe, 3 T. R. 88; Carleton *v.* Leighton, 3 Meriv. 667; Re Inkson's Trusts, 21 Beav. 310; Lyde *v.* Mynn, 4 Sim. 505; Re Duggan's Trusts, L. R. 8 Eq. 697; Smith *v.* Baker, 1 Y. & C. (Ch.) 223.

[7] Re Vizard's Trusts, L. R. 1 Ch. 588; Lee *v.* Olding, 2 Jur. N. S. 850; Ex parte Dever, 18 Q. B. D. 660.

[8] Gibbins *v.* Eyden, L. R. 7 Eq. 371.

wife's equity to a settlement.[1] In England, where the bankrupt had an interest under a marriage settlement, subject to a power, and the power was not exercised, the assignees were held to be entitled, though the donee of the power died after the bankrupt's discharge.[2]

§ 328. **Only existing Rights pass.** — The rule that the assignees take whatever the bankrupt could convey, does not mean all that he might bind himself to convey by a covenant which a court of equity would enforce. This is explained by the Master of the Rolls in Johnson *v.* Smiley.[3] "In one sense a person may validly dispose of property which is not his own; for instance, he may enter into a covenant, for value, to convey to the covenantee every species of property which he might thereafter have devised or bequeathed to him by any stranger, and which he had not, at the time of the covenant, any knowledge of or expectation of receiving. This is not an unusual provision in marriage settlements, but this clearly is not an interest which would pass to the assignees [in bankruptcy]. . . . When, therefore, I speak of an interest which the bankrupt could dispose of, I mean an existing interest, whether vested or contingent, and which, if conveyed or released and assigned by him, requires no further act, on the part of the bankrupt, to vest it in the purchaser."

§ 329. **Divisible Causes of Action.** — There are some few cases in which a cause of action which would have been single if the creditor or claimant had remained solvent, may be divisible, so that the assignees and the bankrupt may severally maintain actions; as where upon a continuing but divisible contract the bankrupt has rendered some services before bankruptcy and some after.[4] But if the cause of action is one which in justice to the defendant cannot be divided, and yet the assignees are entitled to a part of the damages, they are the parties to sue as trustees for themselves and the other

[1] Gardner *v.* Hooper, 3 Gray, 398.

[2] Re Davidson's Trusts, L. R. 15 Eq. 383.

[3] 17 Beav. 223, 230; 22 L. J. N. S. Ch. 826, 829.

[4] See Castelli *v.* Boddington, 1 E. & B. 66, 879; Re Jones, 4 N. B. R. 347, Fed. Cas. No. 7448; Wetherell *v.* Julius, 10 C. B. 267; Bickford *v.* Barnard, 8 Allen, 314; Doll *v.* Cooper, 9 Lea, 576.

party; as where the bankrupt has assigned part of a debt to a purchaser for value, or where he is entitled to pecuniary damages and some personal damages besides.[1]

§ 330. **Powers of Appointment.** — A mere power of appointment though it might be exercised for the benefit of the donee himself is not property and therefore does not vest in the assignees of the bankrupt donee.[2] It may be lost by the bankrupt, if it is appendant to and affects only his own equitable estate; for that passes to the assignees.[3] But if it is in gross, having no connection with his title, or if it can be exercised in such a way as not to impair the title of the assignees, or, if they assent, it may then or to that extent be exercised by the bankrupt.[4]

By many statutes this rule is changed and a power which the bankrupt might make use of for the benefit of creditors vests in his assignees.[5] Under such statutes, if the due exercise of the power depends upon a contingency, the assignees will take subject thereto.[6]

§ 331. **Notes sent to a Bank for Collection.** — If bills or notes are remitted by a customer to his banker, the presumption is that they were sent for collection, and if the banker becomes bankrupt before they have been realized, and the proceeds have by the assignees been mixed with the money of the bankrupt, they must restore them in full.[7] There may be a contract or

[1] See Sims *v.* Thomas, 12 A. & E. 536; D'Arnay *v.* Chesneau, 13 M. & W. 796, 809, per *Parke, B.*; Hodgson *v.* Sidney, L. R. 1 Ex. 313; Morgan *v.* Steble, L. R. 7 Q. B. 611; Whitmore *v.* Gilmour, 12 M. & W. 808.

[2] Thorpe *v.* Goodall, 17 Ves. 388, 460; Jenney *v.* Andrews, 6 Mad. 264. See Warburton *v.* Farn, 16 Sim. 625; Jones *v.* Clifton, 101 U. S. 225; Brandies *v.* Cochrane, 112 U. S. 344; Clark *v.* Wilson, 16 N. B. R. 356; Ex parte Gilchrist, 17 Q. B. D. 521.

[3] Doe *v.* Britain, 2 B. & A. 93; Badham *v.* Mee, 7 Bing. 695, 1 Myl. & K. 32; Hole *v.* Escott, 2 Keen, 444; Bringloe *v.* Goodson, 4 Bing. N. C. 726.

[4] Jones *v.* Winwood, 3 M. & W. 653; Simpson *v.* Bathurst, L. R. 5 Ch. 193; Alexander *v.* Mills, L. R. 6 Ch. 124, approving Holdsworth *v.* Goose, 29 Beav. 111, and Eisdell *v.* Hammersley, 31 Beav. 255.

[5] Robson, 7th ed., p. 480; Act of 1898, § 70 (3). See *infra*, § 533.

[6] Warburton *v.* Farn, 16 Sim. 625; Jenney *v.* Andrews, 6 Mad 264.

[7] Ex parte Smith, Buck, 355; Giles *v.* Perkins, 9 East, 12; Zinck *v.* Walker, 2 W. Bl. 1154; Bolton *v.* Puller, 1 Bos. & P. 539; Thompson *v.* Giles, 2 B. & C. 422; Ex parte Armitstead, 2 Gl. & J. 371; Ex parte Edwards, 2 Mont. D & De G. 625; Ex parte Atkins, 3 Mont. D.

course of dealing by which the banker becomes the owner of such bills or notes; but all presumptions are against it, and the cases on that side are few.[1] The question is always one of fact.[2] A custom of the banker, not communicated to the customer, or an unrestricted indorsement, or leave to draw against the bills, will not rebut the presumption that the property remained in the remitter.[3]

If the customer has drawn against the paper, the banker has a lien for the amount, to which, of course, his assignees succeed.[4] But this lien is only a security, and if the banker compounds with the debtor, the customer may redeem by paying the amount of the composition.[5]

§ 332. **Attachments.** — The right which a plaintiff acquires by attachment of a defendant's property is a lien, and is preserved as against the assignees, unless the statute expressly provides for its dissolution.[6] This was denied by Mr. Justice Story, who, having drafted the bankrupt law of 1841, found its operation much impeded in his circuit of New England, where the law of attachment is extremely liberal and is availed of in all important cases. This learned jurist held that attachments were not exactly liens, but were dependent upon the recovery of judgment, and that he would enjoin the action.[7] His doc-

& De G. 103; Jombart *v.* Woollett, 2 Mylne & C. 389; Ex parte Barkworth, 2 De G. & J. 194; Ex parte Bond, 1 Mont. D. & De G. 10; Ex parte Sollers, 18 Ves. 229; Ex parte Pease, 19 Ves. 25; s. c. 1 Rose, 232; Ex parte Rowton, 1 Rose, 15, 17 Ves. 426; Ex parte Benson, 1 Dea. & Ch. 435 (reversing s. c. *nom.* Ex parte Thompson, Mont. & MacA. 102); Ex parte Gomez, L. R. 10 Ch. 639; Scott *v.* Ocean Bank, 23 N. Y. 289; St. Louis, &c. R. R. Co. *v.* Johnston, 133 U. S. 566; First Nat. Bk. *v.* Armstrong, 42 Fed. Rep. 193; Peck *v.* First N. Bk., 43 Fed. Rep. 357; First Nat. Bk. *v.* First Nat. Bk. 76 Ind. 561; Manufacturers' Bk. *v.* Continental Bk. 148 Mass. 553; Jones *v.* Kilbreth, 49 Ohio St. 401.

[1] See Ex parte Sargeant, 1 Rose, 153, explained in Ex parte Barkworth, 2 De G. & J. 194.

[2] St. Louis, &c. R. R. Co. *v.* Armstrong, 133 U. S. 566.

[3] See note 7, page 240.

[4] Ex parte Leeds Bank, 1 Rose, 254, and cases cited in note. See Vail *v.* Durant, 7 Allen, 408.

[5] Ex parte Gomez, L. R. 10 Ch. 639.

[6] Ex parte Rocke, L. R. 6 Ch. 795; Slater *v.* Pinder, L. R. 6 Ex. 228; L. R. 7 Ex. 95; Emanuel *v.* Bridger, L. R. 9 Q. B. 286; Lowe *v.* Blakemore, L. R. 10 Q. B. 485; Ex parte Joselyne, 8 Ch. D. 327.

[7] Ex parte Foster, 2 Story, 131, Fed. Cas. No. 4960; Fiske *v.* Hunt, 2 Story, 582, Fed. Cas. No. 4831; Ex parte Cook, 2 Story, 376, Fed. Cas.

trine was not accepted by the courts of the States, and a sharp controversy ensued with some of them.[1] After the death of Judge Story, the Supreme Court decided that attachments were liens.[2] The law of 1841 expressly preserved all liens, *eo nomine*, but this was merely declaratory.[3]

§ 333. **Statutory Right of Action.** — A test of the assignee's title to a statutory right of action, is, whether it is given for the benefit of all creditors or all of a designated and ascertained class, on the one hand, as actions for assessments against shareholders, or for malfeasance against directors, which the bankrupt corporation itself might have enforced;[4] these vest in the trustees, because they are in a position to distribute the proceeds; or, on the other hand, rights given to particular creditors, such as to those who have been personally deceived, or to such as became creditors after a certain time. With these the trustees have nothing to do.[5] It was held in the second circuit that a claim which the statute gave to creditors only and not to the corporation to enforce certain personal liabilities did not vest in the trustees.[6] This is doubtful, if all creditors had the right to prosecute. It, may, however, be sustained, if the statute gave an independent right to each creditor, which he might elect not to enforce.

§ 334. **Attachment on Mesne Process.** — Judicial liens, as we have said, are valid against the trustees, unless excepted by statute.[7] Attachments on *mesne process* are now usually dissolved, if they are recent. By the act of Congress of 1867 they were put on the footing of other preferences, and were

No. 3152; Ex parte Bellows, 3 Story, 428, Fed. Cas. No. 1278; Everett *v.* Stone, 3 Story, 446, Fed. Cas. No. 4577.

[1] See Smith *v.* Brown, 14 N. H. 67; Kittredge *v.* Warren, ib. 509; Ames *v.* Wentworth, 5 Met. 294; Shaffer *v.* McMaken, 1 Ind. 274.

[2] Peck *v.* Jenness, 7 How. 612.

[3] See note 6, page 241.

[4] Sawyer *v.* Hoag, 17 Wall. 610; Trustees Mut. Building Fund *v.* Boseiux, 3 Fed. Rep. 817; Wilkins *v.* Davis, 2 Lowell, 511, Fed. Cas. No. 17,664.

[5] See Wilkins *v.* Davis, 2 Lowell, 511, Fed. Cas. No. 17,664; Dutcher *v.* Marine Bank, 12 Blatch. 435, Fed. Cas. No. 4203; Bristol *v.* Sanford, 12 Blatch. 341, Fed. Cas. No. 1893; Calhoun *v.* Richardson, 30 Conn. 210, 229 (note).

[6] Dutcher *v.* Marine Bank, 12 Blatch. 435, Fed. Cas. No. 4203.

[7] Peck *v.* Jenness, 7 How. 612; Re Paine, 17 N. B. R. 37, Fed. Cas. No. 10,673. See § 332.

dissolved by the assignment, unless they had been laid more than four months before the beginning of the proceedings in bankruptcy; and this limitation has been adopted in Massachusetts, where formerly all attachments, however ancient, were discharged.[1] The dissolution will be operated, although the cause of action should be a *tort* not provable in the bankruptcy.[2] The word attachment has been very liberally construed to apply to sequestrations and other similar processes at law or in equity.[3]

Liens by attachment or judgment were dissolved by one of the early statutes in England, unless there had been a levy or seizure upon the execution.[4] The law of England of 1883 is substantially similar, except that if bankruptcy occurs within fourteen days after a sale of goods on execution, and notice is given the sheriff he is to pay the net amount to the trustee or receiver.[5]

That a rule of this sort, giving the right to dissolve for a certain time after the levy of execution is useful was said by CURTIS, J., delivering the opinion of the Supreme Court.[6]

The dissolution of judicial liens being a result of the vesting order, an arrangement by composition or otherwise, by which the proceedings are dismissed without such an order, will not discharge the creditor's lien.[7] But if the decree is made, the officer will be protected in obeying it, though the proceedings

[1] Act of 1867, § 14, 14 St. 522; Rev. Stat. § 5044; Pub. Sts. (Mass.) c. 157, § 46. See Act of 1898, § 67; *infra*, § 530.

[2] Stetson *v.* Hayden, 8 Met. 29; Codman *v.* Freeman, 3 Cush. 306; Shelton *v.* Codman, 3 Cush. 318; Grant *v.* Lyman, 4 Met. 470.

[3] Smith *v.* Gordon, 6 Law Rep. 313, Fed. Cas. No. 13,052; Trow *v.* Lovett, 122 Mass. 571; Ex parte Hughes, L. R. 12 Eq. 137; Ballin *v.* Ferst, 55 Ga. 546; Re Joslyn, 2 Biss. 235, Fed. Cas. No. 7550.

[4] 21 Jac. 1, c. 19, § 9.

[5] 46 & 47 Vict. c. 52, §§ 45–47.

[6] Buckingham *v.* McLean, 13 How. 151.

[7] Ex parte Sheriff of Middlesex, L. R. 12 Eq. 207; Crew *v.* Terry, 2 C. P. D. 403; Re Chidley, 1 Ch. D. 177; Ex parte Jones, L. R. 10 Ch. 663; Re Bestwick, 1 Ch. D. 702, 2 Ch. D. 485; Re Clapp, 2 Lowell, 468, Fed. Cas. 2785; Re Scott, 15 N. B. R. 73, Fed. Cas. No. 12,519; Re Shields, 4 Dill. 588, Fed. Cas. No. 12,784; Cutter *v.* Gay, 8 Allen, 134; Hill *v.* Keyes, 10 Allen, 258; Sage *v.* Heller, 124 Mass. 213; Cunningham *v.* Hall, 69 Maine, 353; Re Irons, 18 N. B. R. 95, Fed. Cas. No. 7067; McGehee *v.* Hentz, 19 N. B. R. 136, Fed. Cas. No. 8794.

should be afterwards dismissed for any cause, unless, possibly, entire want of jurisdiction apparent on the face of the proceedings.[1]

§ 335. **Attachment of Firm Property.** — An attachment of the joint property of a firm for a partnership debt is not dissolved by the bankruptcy of one or more of the partners less than all,[2] but since the bankruptcy of one partner will dissolve the partnership, and since the debts and assets are marshalled in the same way, whether one or more partners are bankrupt, an attachment of joint property made after the bankruptcy of one partner will not be valid.[3]

A joint bankruptcy, of course, dissolves separate as well as joint attachments; and separate bankruptcies of all the partners has a like effect, because in both these cases the whole property joint and separate of all the partners is vested in the assignees.

§ 336. **Levy on Execution.** — Actual seizure or levy upon execution before the bankruptcy creates a lien if none is given by statute or common law, or confirms and renders indissoluble the lien of an attachment or judgment, unless the bankrupt law expressly deals with such seizures,[4] but the mere entry of judgment does not have this effect[5] unless the judgment itself creates a lien.[5]

Demand upon a garnishee or receiptor is equivalent to seizure.[6] But a demand for specific chattels is not equivalent to seizure when they are not in the hands of a receiptor or of some one legally bound to deliver them to the judgment creditor on demand.[7] If, however, the creditor has been pre-

[1] Penniman *v.* Freeman, 3 Gray, 245; Smallcombe *v.* Olivier, 13 M. & W. 77.

[2] Fern *v.* Cushing, 4 Cush. 357; Brickwood *v.* Miller, 3 Meriv. 279; Mason *v.* Warthen, 14 N. B. R. 346; Ex parte Isaac, L. R. 6 Ch. 58.

[3] Barker *v.* Goodair, 11 Ves. 78; Dutton *v.* Morrison, 17 Ves. 193; Re Wait, 1 Jac. & W. 605.

[4] Cushing *v.* Arnold, 9 Met. 23; Hall *v.* Crocker, 3 Met. 245; Marshall *v.* Knox, 16 Wall. 551, 559, per *Bradley, J.*; Wilson *v.* City Bank, 17 Wall. 473; Nason *v.* Hobbs, 75 Maine, 396; Re Shirley, 9 Fed. Rep. 901; Epperson *v.* Robertson, 91 Tenn. 407. See *infra*, § 530.

[5] Andrews *v.* Southwick, 13 Met. 535; Butler *v.* Mullen, 100 Mass. 453.

[6] Franklin Bank *v.* Bachelder, 23 Maine, 60; Parks *v.* Sheldon, 36 Conn. 466; Storer *v.* Haynes, 67 Maine, 420.

[7] Beers *v.* Place, 36 Conn. 578.

vented from seizing by the injunction of the court of bankruptcy, his lien will be preserved in that jurisdiction.[1]

§ 337. **Dissolution of Attachment; Creditors' Rights.** — When the statute dissolves attachments upon the property of the bankrupt, it would seem to follow that if the debtor after an attachment has been laid but before his bankruptcy has sold the attached property, the creditor should have the right to pursue his remedy against what is now the property of a third person. But in Massachusetts the assignment purports to convey whatever property or estate could be taken on an execution against the bankrupt, and property which has been attached while his can be so taken, and therefore goes to the assignees.[2] And the assignees by the statute may prosecute an action by subrogation to the rights of an attaching creditor, and realize the value of the attachment for the general benefit.[3] Where the bankrupt has merely incumbered the property subject to the attachment, the equity belongs to the trustees, and the courts have permitted them to have this subrogation without an express statute authorizing it.[4]

If an attachment is dissolved the assignees are not bound to appear in the attachment suit and ask relief, and, indeed, in most courts would have no standing to do so. The title to the attached property is changed, and if the creditor levies upon it, though without actual notice of the bankruptcy, he must refund to the assignees and prove in the bankruptcy.[5]

§ 338. **Qualified Judgment, when Attachment not Dissolved.** — If the attachment from its age or for any other reason is not discharged, the plaintiff may have a qualified judgment against the attached property, notwithstanding the debtor's discharge.[6]

[1] Davis *v.* Stitzer, 19 N. B. R. 61, Fed. Cas. No. 3654.

[2] Parsons *v.* Merrill, 5 Met. 356; Day *v.* Lamb, 6 Gray, 523; Act of 1898, § 70 *a* (5). *Infra*, § 533.

[3] Pub. Sts. (Mass.), c. 157, § 47. Act of 1898, § 67 *f*. *Infra*, § 530.

[4] Re Nelson, 9 Ben. 238, Fed. Cas. No. 10,100; Re Klancke, 4 N. B. R. 648, Fed. Cas. No. 7864; Re Badenheim, 15 N. B. R. 370, Fed. Cas. No. 716; Re Steele, 16 N. B. R. 105 Fed. Cas. No. 13,345.

[5] Bracken *v.* Johnston, 15 N. B. R. 106, Fed. Cas. No. 1761; Bradley *v.* Frost, 3 Dillon, 457, Fed. Cas. No. 1780; Bosworth *v.* Pomeroy, 112 Mass. 293; Duffield *v.* Horton, 73 N. Y. 218.

[6] Ingraham *v.* Phillips, 1 Day, 117; Peck *v.* Jenness, 7 How. 612; Davenport *v.* Tilton, 10 Met. 320; Kittredge *v.* Warren, 14 N. H. 509; Stoddard *v.*

§ 339. **Bond to Dissolve Attachment.** — If a statutory bond to dissolve an attachment has been given by a defendant, conditioned to pay the judgment when obtained, and the defendant is discharged in bankruptcy so that no personal judgment can be obtained against him, but the attachment was so old as to be indissoluble, several courts have held that they could enter a special judgment against the sureties, though the defendant should receive his discharge.[1] This was not the law of Massachusetts[2] until an amendment was made in the statute.[3] The statute was held not to apply to a discharge by composition when there had been no assignment, and the attachment was made within four months of the proceedings in bankruptcy.[4]

§ 340. **Attachment; Receiptor.** — If the attached property is restored to the debtor upon his procuring a receiptor who undertakes that the property shall be forthcoming to answer the judgment, and the attachment is dissolved by the decree, the receiptor is discharged.[5] If the attachment is not dissolved, the property is not discharged excepting as to bona fide purchasers, and the receiptor is liable, and has an equity to require the property to be applied to the attaching creditor's debt.[6] In one interesting case a creditor attached joint property for the debt of one of the partners, and the firm became bankrupt more than four months afterwards; but it was proved that the partnership debts exceeded the whole value of the joint property and the court held that a receiptor was not liable, because the attachment, in law and equity, bound only the debtor's share of the surplus.[7]

Locke, 43 Vt. 574; Bates *v.* Tappan, 99 Mass. 376; Batchelder *v.* Putnam, 13 N. B. R. 404, 54 N. H. 84; Alsop *v.* White, 45 Conn. 499; Walters *v.* Oyster, 1 Cent. Rep. 557 (Pa.).

[1] Re Albrecht, 17 N. B. R. 287; Fed. Cas. No. 145. See Holyoke *v.* Adams, 10 N. B. R. 270; s. c. 59 N. Y. 233; Zollar *v.* Janvrin, 49 N. H. 114.

[2] Carpenter *v.* Turrell, 100 Mass. 450; Hamilton *v.* Bryant, 114 Mass. 543; Braley *v.* Boomer, 116 Mass. 527; Johnson *v.* Collins, 117 Mass. 343.

[3] Barnstable Savings Bank *v.* Higgins, 124 Mass. 115.

[4] Denny *v.* Merrifield, 128 Mass. 228.

[5] Sprague *v.* Wheatland, 3 Met. 416; Butterfield *v.* Converse, 10 Cush. 317; Lindner *v.* Brock, 40 Mich. 618; Kaiser *v.* Richardson, 14 N. B. R. 391; Shumway *v.* Carpenter, 13 Allen, 68; Lewis *v.* Webber, 116 Mass. 450; Wright *v.* Dawson, 147 Mass. 384; Wright *v.* Morley, 150 Mass. 513.

[6] Batchelder *v.* Putnam, 13 N. B. R. 404, 54 N. H. 84; Alsop *v.* White, 45 Conn. 499; Lamprey *v.* Leavitt, 20 N. H. 544; Rowe *v.* Page, 54 N. H. 190.

[7] Lewis *v.* Webber, 116 Mass. 450.

§ 341. **Attachment of Exempted Property.** — When the bankrupt law exempts or excludes from the operation of the adjudication property which is not exempted from attachment by the state law, an attachment of such property will not be dissolved, because the assignees have no interest in it; and it is only for their benefit as trustees for the creditors that the dissolution is to take effect.[1] Some decisions to the contrary may be found;[2] but they are unsatisfactory, not only upon general reasoning, but because the bankrupt law of 1867, under which they were made, expressly declared that the exempted property should not vest in the assignees, and it was the vesting order which dissolved attachments.

§ 342. **Attachments before Statute.** — Whether attachments and similar liens already laid upon the debtor's property when the bankrupt law is passed will be dissolved, must depend on the words of the statute. It is not unusual to reserve expressly existing rights, liens, or securities, and such a reservation will include liens, rights, and securities created by process of law, although similar securities if obtained after the passage of the act would be dissolved.[3]

§ 343. **Costs of Attaching Creditor.** — If the statute dissolves attachments which were valid when they were made, it ought to provide for the payment in full of the costs of the process. This is recognized in the law of Massachusetts, which makes the costs a privileged debt, if the creditor proves his claim.[4] The late Act of Congress failed to provide for such payment, but the courts were able in some cases to authorize it, as a sort of equitable charge upon the attached property.[5] No provision was made in either jurisdiction for the costs of a plaintiff who had a claim not in its nature provable.[6]

[1] Robinson *v.* Wilson, 14 N. B. R. 565, Jackson *v.* Allen, 30 Ark. 110; Bush *v.* Lester, 55 Ga. 579.

[2] Re Ellis, 1 N. B. R. 555, Fed. Cas. No. 4400; Re Hambright, 2 N. B. R. 498, Fed. Cas. No. 5073; Re Stevens, 5 N. B. R. 298, Fed. Cas. No. 13,392.

[3] Ingraham *v.* Phillips, 1 Day, 117; Kilborn *v.* Lyman, 6 Met. 299.

[4] Pub. Sts. Ch. 157, § 139.

[5] See Ex parte Foster, 2 Story, 131, Fed. Cas. No. 4960; Re Fortune, 1 Lowell, 306 Fed. Cas. No. 4955; Re Ward, 9 N. B. R. 349, Fed. Cas. No. 17,145; Re Houseberger, 2 N. B. R. 92, Fed. Cas. No. 6734; Ex parte Hadfield, 2 Dea. 113; Ex parte Ralph, 3 M. D. & De G. 331; Ex parte Shaw, 1 De G. 242. Act of 1898, § 63 (3). *Infra*, § 526.

[6] Re Foye, 2 Lowell, 399 Fed. Cas. No. 5021.

§ 344. **Distress for Rent.** — The landlord is peculiarly favored by the common law in being permitted to distrain for his rent upon all goods and chattels found on the demised premises. If this right is exercised before bankruptcy, the landlord is a secured creditor, and holds his security unless he makes the mistake of proving his debt in full.[1] After the bankruptcy, he may still seize the goods of the assignees on the premises whether they have elected to assume the lease or not.[2] But in England his right as against creditors is limited to one year's arrears.[3]

In New England there has never been a distress for rent, and it has been abolished in some other States. Where it still exists it is regulated by statute.[4] In some of the States there is a lien or privilege within the limits before mentioned without the necessity of a distress;[5] in others there is a distress for one year's rent, as in England;[6] in still a third class the distress must be executed before the title of the assignees accrues, or the privilege will be lost.[7]

§ 345. **Creditors bound by Assignees' Neglect.** — The creditors will be bound by the neglect of the assignees to assert title to the bankrupt's property when equities of third persons have intervened, sufficient to work an estoppel.[8] An instructive example of this in England respects the property acquired by an undischarged bankrupt. Such property may be usually taken by the trustees; but if they have permitted him to carry on trade and to contract debts in procuring this property, their title will, by estoppel, be postponed to that of the newer credi-

[1] Marshall *v.* Knox, 16 Wall. 551.

[2] Anon. 1 Atk. 102; Ex parte Plummer, 1 Atk. 103; Buckley *v.* Taylor, 2 T. R. 600; Briggs *v.* Sowry, 8 M. & W. 729; Ex parte Hale, 1 Ch. D. 285.

[3] Robson, 7th ed., p. 295.

[4] See Taylor, Landlord and Tenant, Title Distress.

[5] Austin *v.* O'Reilly, 2 Woods, 670, Fed. Cas. No. 665; Re Wynne, Chase, 227, Fed. Cas. No. 18,117; Re Trim, 5 N. B. R. 23, Fed. Cas. No. 14,174.

[6] 2 Taylor, Landlord and Tenant, 8th ed., § 558.

[7] Re Joslyn, 2 Biss. 235, Fed. Cas. No. 7550; Morgan *v.* Campbell, 22 Wall. 381.

[8] Lawrence *v.* Knowles, 5 Bing. N. C. 399; Ex parte Douglas, 3 Dea. & Ch. 310; Ex parte Davis & Denton, L. R. 2 Ch. 363; Taylor *v.* Irwin, 20 Fed. Rep. 615; Re Lond. & Prov. Tel. Co., L. R. 9 Eq. 653; Sessions *v.* Romadka, 145 U. S. 29; Kip *v.* Hirsh, 103 N. Y. 565; Stainback *v.* Junk, 98 Tenn. 306.

tors.[1] If property has been concealed from the knowledge of the assignees, or if for any reason they are in no fault, their title will be superior to that even of innocent third persons.[2] As against the bankrupt and volunteers under him, or persons not injured by delay, time works no injury to the rights of his trustees unless some statute of limitations applies.[3]

§ 346. **Assignees succeed to the Title which is displaced.** — When the bankrupt law makes certain acts or things voidable which would otherwise be valid, and the assignees avoid them, they succeed, by a sort of subrogation, to the title which is displaced. Thus, if an attachment is dissolved, the assignees have a claim upon the property to the extent of the debts secured by the attachment, in preference to subsequent incumbrancers.[4]

If conveyances good at common law are set aside as being against the bankrupt act, the assignees hold the property against intermediate attachments, seizures, or creditors' bills.[5] If security is waived by a creditor proving his debt as if unsecured, a subsequent incumbrancer obtains no advantage, but only the assignees.[6]

This principle, though recognized in some of the earlier

[1] Troughton *v.* Gitley, Ambl. 630; Tucker *v.* Hernaman, 1 Sm & Giff. 394, 4 De G. M. & G. 395; Ex parte Butler, 2 M. D. & De G. 731; Butler *v.* Hobson, 4 Bing. N. C. 290; Ex parte Jungmichel, 2 M. D. & De G. 471; Engleback *v.* Nixon, L. R. 10 C. P. 645; Ex parte Bolland, 9 Ch. D. 312.

[2] Gay *v.* Kingsley, 11 Allen, 345; Ex parte Ford, 1 Ch. D. 521; Meggy *v.* Imp. Disc. Co., 3 Q. B. D. 711; Cole *v.* Coles, 6 Hare, 517; Hall *v.* Whiston, 5 Allen, 126.

[3] Re Lond. & Prov. Tel. Co., L. R. 9 Eq. 653. See decree p. 657: Penny *v.* Pickwick, 16 Beav. 246; Roseboom *v.* Mosher, 2 Denio, 61.

[4] Re Nelson, 9 Ben. 238, Fed. Cas. No. 10,100; Re Klancke, 4 N. B. R. 648, Fed. Cas. No. 7864; Re Badenheim, 15 N. B. R. 370, Fed. Cas. No. 716; Re Steele, 16 N. B. R. 105, Fed. Cas. No. 13,345. See Act of 1898, § 67 f. *Infra*, § 530.

[5] Oswald *v.* Thompson, 2 Ex. 215; Fawcett *v.* Fearne, 6 Q. B. 20; Congreve *v.* Evetts, 10 Ex. 298; Everett *v.* Stone, 3 Story, 446, Fed. Cas. No. 4577; Dodge *v.* Sheldon, 6 Hill, 9; Penniman *v.* Cole, 8 Met. 496; Seaman *v.* Stoughton, 3 Barb. Ch. 344; Carr *v.* Acraman, 11 Ex. 566; Read *v.* McIntyre, 98 U. S. 507; Johnson *v.* Rogers, 15 N. B. R. 1, Fed. Cas. No. 7408; Re Beisenthal, 14 Blatch. 146, Fed. Cas. No. 1236; Anshutz *v.* Hoerr, 1 Fed. Rep. 592; Seal *v.* Duffy, 4 Penn. St. 274; Re Croughwell, 9 Ben. 360, Fed. Cas. No. 3440; Linder *v.* Lewis, 10 Ben. 49, Fed. Cas. No. 8362.

[6] Wallace *v.* Conrad, 3 N. B. R. 41; Hiscock *v.* Jaycox, 12 N. B. R. 507, Fed. Cas. No. 6531; Cracknall *v.* Janson, 6 Ch. D. 735.

English cases, has lately been denied, and a subsequent incumbrancer has been permitted to hold, though, excepting for the bankruptcy, he would have been subordinate to the one whose title is displaced.[1] The judges in one case remarked that their decision was singular, and not in accordance with the intent of the legislature; but held that the words of the statute required it,[2] not observing that the word "void," in this connection, means voidable by the trustees for the benefit of the general creditors. The true alternative is that if the first incumbrance cannot be avoided except for the benefit of one which is subordinate to it, it should remain valid.[3]

The latest English statute corrects this mistake, so far as it affects money received from a sale on execution.[4]

§ 347. **Assignees may condone a Fraud.** — As the assignees may avoid a fraud, so they may condone it, for they have all the rights as well of the bankrupt as of his creditors.[5]

§ 348. **Assignees may transfer the Right to avoid a Fraud.** — The trustees have the extraordinary power of transferring to a purchaser their right to avoid a fraudulent conveyance.[6] But since they may not choose to grant this right, it must appear by a fair construction of their transfer that they intend to do so. A mere release of their title will not have this effect, and a sale subject to a mortgage affirms the mortgage so far as the buyer is concerned.[7]

§ 349. **Rights belonging to some Creditors only do not vest in the Assignee.** — Frauds, representations, acts, or neglects of a third person by reason of which certain but not all of the

[1] Graham *v.* Witherby, 7 Q. B. 491; Re Barrand, 3 Ch. D. 324; 4 Ch. D. 23; Ex parte Payne, 11 Ch. D. 539; Re Artistic Colour Co., 21 Ch. D. 510; Sanguinetti *v.* Stuckey's Banking Co. [1895], 1 Ch. 176.

[2] Ex parte Blaiberg, 23 Ch. D. 254.

[3] See Wilcocks *v.* Waln, 10 S. & R. 380; Manuf. & M. Bank *v.* Bank of Pa., 7 Watts & S. 335; Shulze's App. 1 Penn. St. 251; Tomb's App. 9 Penn. St. 61. See per *Cave, J.*, Re Pearce, 2 Morrell, 105.

[4] Re Pearce, 2 Morrell, 105.

[5] Butler *v.* Hildreth, 5 Met. 49; Snow *v.* Lang, 2 Allen, 18; Harvey *v.* Varney, 98 Mass. 118.

[6] Dwinel *v.* Perley, 32 Maine, 197; Freeland *v.* Freeland, 102 Mass. 475; Traer *v.* Clews, 115 U. S. 528; Seear *v.* Lawson, 15 Ch. D. 426, 434, per *James, L. J.*

[7] Brewer *v.* Hyndman, 18 N. H. 9; Bean *v.* Brackett, 34 N. H. 102; Tuite *v.* Stevens, 98 Mass. 305.

creditors of the bankrupt may have a remedy against him or his property for the bankrupt's debts to them, do not vest in the assignees. As where A has held himself out to some creditors as a partner of the bankrupt; or has deceived some of them by leaving his goods in the bankrupt's hands, etc.[1] The reason is obvious, that these rights of action are in the nature of estoppels in favor of those persons who have been deceived rather than property which can justly be applied for the general benefit. Therefore, where a statute gave an action against the directors of a corporation for debts contracted at a certain time or in a certain way, and all were not so contracted, the assignees of the corporation could maintain no action against the directors.[2]

§ 350. **Creditors bound by Assignees' Estoppel.** — The assignees, representing the creditors, may bind them by their laches. Thus, though in England all property of an undischarged bankrupt vests in his trustees, yet if they permit the bankrupt to trade, they will be estopped to set up as against creditors of that trade, a title to property which he may have acquired therein.[3] So if the bankrupt has onerous property which required him and his assignees in his right to take active measures, such as to pay instalments or assessments, and they have failed to make them, their abandonment of the property will be presumed as against a third person who has been misled, or who would suffer by holding the title good.[4] Where a creditor's bill was filed before the bankruptcy to charge property alleged to have been fraudulently conveyed by the bankrupt, and the assignees were notified and neglected for a long time to come in, and when they applied for leave did not offer to contribute to the expenses, their title was held to have been abandoned.[5] So if the proceedings are or may be

[1] See 1 Bates, Partnership, § 91; Audenried *v.* Betteley, 5 Allen, 382; Sawyer *v.* Turpin, 91 U. S. 114, 121.

[2] See § 333.

[3] Troughton *v.* Gitley, Ambl. 630; Engleback *v.* Nixon, L. R. 10 C. P. 645; Butler *v.* Hobson, 4 Bing. N. C. 290; and cases cited *ante*, § 345.

[4] Lawrence *v.* Knowles, 5 Bing. N. C. 399; Re Lond. & Prov. Tel. Co., L. R. 9 Eq. 653; Ex parte Hannington, 18 W. R. 959; Penny *v.* Pickwick, 16 Beav. 246.

[5] Smith *v.* Gordon, 6 Law Reporter, 313; Fed. Cas. No. 13,052; Rugely *v.* Robinson, 19 Ala. 404.

presumed to be closed, a resulting trust has been found to be vested in the bankrupt by the lapse of a long period and other circumstances.[1]

It was held in one case that where the bankrupt had made a voluntary settlement of furniture, and his assignees had assumed that the settlement was valid, and permitted his possession to be undisturbed for three years, an execution creditor for a debt incurred after the bankruptcy might hold against the assignees, the trustees of the settlement having withdrawn their claim. This case was assumed by the chief judge in bankruptcy to come within the law of estoppel above considered.[2]

§ 351. **Assignees may prosecute pending Suits.** — If a creditor's bill (authorized by statute) to reach and apply to the payment of the single creditor's debt property of the debtor fraudulently conveyed by him, or to which he has an equitable title, is pending at the date of the bankruptcy, it has been held that if the assignees do not intervene after notice, the suit may be prosecuted by the plaintiffs, whether for their own benefit or that of the assignees does not clearly appear.[3]

The assignees having the sole title to property however situated and in whatever court to be recovered, and the sole right to set aside frauds, may, it is said, have such a suit dismissed.[4] They may, on the other hand, be permitted to prosecute any suit which is brought for the benefit of creditors generally, and in some courts those in behalf of any one or more creditors, the decree in all such cases being for creditors generally through the assignees.[5]

§ 352. **Fraudulent Sale.** — When a trader fails, all dealers who have lately sold him goods endeavor to recover them in specie. Hence the question often arises whether the purchase was made in good faith. In England and several states it is the

[1] Ross *v.* McJunkin, 14 S. & R. 364; Power *v.* Hollman, 2 Watts, 218; Sailor *v.* Hertzog, 4 Wharton, 259.

[2] Ex parte Hannington, 18 W. R. 959.

[3] See Squire *v.* Lincoln, 137 Mass. 399; Powers *v.* Raymond, 137 Mass. 483.

[4] Squire *v.* Lincoln, 137 Mass. 399; Powers *v.* Raymond, 137 Mass. 483.

[5] Bate *v.* Graham, 11 N. Y. 237; Crouse *v.* Frothingham, 97 N. Y. 105; Goldsmith *v.* Russell, 5 De G. M. & G. 547; Crossley *v.* Elworthy, L. R. 12 Eq. 158.

law that one who buys goods with a distinct intent not to pay for them is guilty of a fraud which avoids the sale at the election of the seller.[1] But the mere insolvency of the buyer, however desperate, is, of itself, but evidence, more or less forcible according to the circumstances, that this fraud was intended. Taken by itself it is not very strong, because it is well known that insolvent traders often delude themselves with the hope of some lucky change in their situation.[2] If, however, the buyer has in terms misrepresented his situation, or if he can be proved to have bought the goods in order to swell the volume of his assets, or to sell at a sacrifice with intent to prepare for bankruptcy, the sale is voidable.[3]

§ 353. **Stoppage in Transitu.** — The right of a seller to retain or to stop goods *in transitu* is a subject intimately connected with bankruptcy; but the writers on "sales" have so thoroughly examined it, that notes on a few points will here suffice.[4]

§ 354. **Detainer.** — The seller of goods for credit, which have not gone out of his possession and have not been paid for, may detain them, though the general property has passed, if the buyer becomes insolvent. The negotiable note or acceptance of the insolvent himself is not considered payment unless distinctly agreed to be received as such.[5]

§ 355. **Insolvency of Buyer.** — The right of stoppage *in transitu* of goods which have been forwarded on the credit of the buyer is considered a sort of extension of the seller's lien, and can be exercised only upon the insolvency or bankruptcy of the buyer. A notorious insolvency is not necessary to the exercise of this right; but a stoppage of payment, or inability

[1] Benjamin, Sales, 4th ed. p. 431; Tiffany, Sales, p. 114.

[2] Conyers *v.* Ennis, 2 Mason, 236, Fed. Cas. No. 3149; Biggs *v.* Barry, 2 Curtis C. C. 259, Fed. Cas. No. 1402; Ex parte Whittaker, L. R. 10 Ch. 446.

[3] Legrand *v.* Eufaula Bank, 81 Ala. 123; Wilson *v.* White, 80 N. C. 280.

[4] See Lyons *v.* Hoffnung, 15 Ap. Cas. 391; Re Gurney, 67 L. T. 598.

[5] Bloxam *v.* Sanders, 4 B. & C. 941, 949, per *Bayley, J.*, citing Hanson *v.* Meyer, 6 East, 614; Miles *v.* Gorton, 2 C. & M. 504; McEwan *v.* Smith, 2 H. of L. 309; Valpy *v.* Oakeley, 16 Q. B. 941; Arnold *v.* Delano, 4 Cush. 33; Roget *v.* Merritt, 2 Caines, 117; Benedict *v.* Field, 16 N. Y. 595; Griffiths *v.* Perry, 1 El. & El. 680; Townley *v.* Crump, 4 A. & E. 58; Bloxam *v.* Morley, 4 B. & C. 951; Ex parte Chalmers, L. R. 8 Ch. 289.

to pay in the ordinary course of business, that is, insolvency in the mercantile sense, is sufficient.[1]

§ 356. **Assignees taking Possession after Goods are stopped.** — If the goods are stopped before the title of the assignees accrues, and they nevertheless obtain possession, they will be liable in trover or other appropriate form of action, or if the remedy at law is inadequate in the particular case the vendor may maintain a suit in equity.[2]

The seller may give notice to stop, notwithstanding valid sales or pledges by the original purchaser, and though he cannot hold the goods, he can recover of the trustee in bankruptcy of the original purchaser any money which may afterwards come to him as such trustee from such sub-purchasers or as a surplus beyond the pledgee's debt.[3]

§ 357. **Right to stop not defeated by Attachment.** — The right of the seller to stop the goods while in transit cannot be defeated by attachment or other legal diligence on the part of creditors of the buyer,[4] and therefore not by a deed or decree vesting his property in trustees.[5]

§ 358. **End of Transit.** — Actual possession by the buyer or his trustees before notice to stop puts an end to the transit; for bankruptcy does not rescind the contract nor give rise to a trust, nor require the bankrupt or his assignees not to receive the goods.[6]

[1] See Durgy Cement Co. *v.* O'Brien, 123 Mass. 12; Naylor *v.* Dennie, 8 Pick. 198; Reynolds *v.* Boston & Maine R. R. Co., 43 N. H. 580; Re Phœnix Bessemer Steel Co., 4 Ch. D. 108; Smith *v.* Barker, 102 Ala. 679. See Gayden *v.* Tufts, 68 Miss. 691.

[2] Litt *v.* Cowley, 7 Taunt. 169; Hause *v.* Judson, 4 Dana, 7; Spalding *v.* Ruding, 6 Beav. 376; Berndtson *v.* Strang, L. R. 4 Eq. 481; Schotsmans *v.* Lancashire Ry. Co., L. R. 2 Ch. 332, per *Cairns, L. J.*

[3] Re Westzinthus, 5 B. & Ad. 817; Spalding *v.* Ruding, 6 Beav. 376; Berndtson *v.* Strang, L. R. 4 Eq. 481; Ex parte Falk, 14 Ch. D. 446, affirmed Kemp *v.* Falk, 7 App. Cas. 573; Ex parte Golding, 13 Ch. D. 628.

[4] Naylor *v.* Dennie, 8 Pick. 198; Seymour *v.* Newton, 105 Mass. 272; Mohr *v.* Boston & Albany R. R. Co., 106 Mass. 67; Durgy Cement Co. v. O'Brien, 123 Mass. 12; Atkins *v.* Colby, 20 N. H. 154; Hause *v.* Judson, 4 Dana, 7; Buckley *v.* Furniss, 15 Wend. 137; 17 Wend. 504; Sturtevant *v.* Orser, 24 N. Y. 538; Schuster *v.* Carson, 28 Neb. 612; Bayonne Knife Co. *v.* Umbenhauer, 107 Ala. 496.

[5] Stanton *v.* Eager, 16 Pick. 467; Rodger *v.* Comptoir d'Escompte, L. R. 3 P. C. 393; Harris *v.* Pratt, 17 N. Y. 249; Hodgson *v.* Loy, 7 T. R. 440.

[6] Scott *v.* Pettit, 3 B. & P. 469; Ellis *v.* Hunt, 3 T. R. 464; Conyers *v.* Ennis, 2 Mason, 236, Fed. Cas. No. 3149; Van Casteel *v.* Booker, 2 Ex.

§ 359. **Insolvent Buyer may refuse the Goods.** — The strong equitable objection to the appropriation of the goods of an innocent seller to pay the debts of a buyer who has become insolvent, has induced the courts to extend the right of stoppage *in transitu* to its utmost limits. Among other things, it is held, very justly, that a buyer who discovers his insolvency before the transit is ended may refuse to receive the goods and notify the seller of this determination, and this will work an effectual stoppage, though given after the buyer has committed an act of bankruptcy to which the title of the assignees will eventually relate, or after a creditor has attached. The assent of the seller, if necessary at all, may be given after the trustees have become actually vested with the assets.[1] It would seem to follow that if the trustees decline to receive goods coming to them after the bankruptcy, and bought on credit, they will not be guilty of a breach of trust; but I have seen no decision upon this point.

§ 360. **Buyer cannot return after Transit is ended.** — It is often said that a stoppage *in transitu* must be "adverse," [2] but the cases just cited show that this dictum only means that the consignor cannot, as against a trustee in bankruptcy, acquire a title by agreement with the consignee after his own right is lost. Therefore, if there is a bankrupt law in force, a buyer cannot, when the transit has fully ended, return the goods to the seller in satisfaction or rescission after the time to which the title of the assignees relates;[3] nor under circumstances which would make payment or security of the price a fraudulent preference.[4] Atkin *v.* Barwick,[5] as reported, seems opposed to

691; Heinekey *v.* Earle, 8 E. & B. 410; Haswell *v.* Hunt, stated 5 T. R. 231; Milward *v.* Forbes, 4 Esp. 172.

[1] Mills *v.* Ball, 2 B. & P. 457; Richardson *v.* Goss, 3 B. & P. 119; Naylor *v.* Dennie, 8 Pick. 198; Bartram *v.* Farebrother, 4 Bing. 579; Stanton *v.* Eager, 16 Pick. 467; Ash *v.* Putnam, 1 Hill, 302; Grout *v.* Hill, 4 Gray, 361; James *v.* Griffin, 1 M. & W. 20; 2 M. & W. 623; Sturtevant *v.* Orser, 24 N. Y. 538; Re Foot, 11 Blatch. 530; Fed. Cas. No. 4907; Re O'Sullivan, 67 L. T. 464; Kloes *v.* Wurmser, 34 Mo. Ap. 453; Jenks *v.* Fulmer, 160 Pa. St. 527; Weber *v.* Baessler, 3 Col. Ap. 459.

[2] Siffken *v.* Wray, 6 East, 371; Robson, 7th ed., 433. See remarks of the court in Naylor *v.* Dennie, 8 Pick. 198.

[3] Siffken *v.* Wray, 6 East, 371.

[4] Barnes *v.* Freeland, 6 T. R., 80; Van Casteel *v.* Booker, 2 Ex. 691; Mills *v.* Ball, 2 B. & P. 457, per *Heath, J.*; Benjamin, 2nd Am. ed., § 499; Robson, 7th ed., 434; Ex parte Topham, L. R. 8 Ch. 614; Ex parte Blackburn, L. R. 12 Eq. 358; Re Aspinwall, 11 Fed. Rep. 136.

[5] 1 Strange, 165.

this conclusion. That case was decided before the law of preference was fully developed, and has been understood by many learned judges to have been a case of return of goods before the transit was ended.[1] If not so it is not now good law.[2]

But a preference can only be avoided by the trustees, and therefore, if the buyer does not become bankrupt, or if the circumstances do not show a case of fraudulent preference, and there are no intervening liens, creditors cannot object to a return of the goods.[3]

§ 361. **Stoppage in Transitu does not Rescind Sale.** — A retention or stoppage *in transitu* is not a rescission of the sale; but the seller becomes a secured creditor, who must apply to the court of bankruptcy for leave to sell the goods if he desires to prove for a deficiency. Upon such application, he will be permitted to sell and account to the assignees for whatever they may have brought beyond the agreed price, or prove for the deficiency, as the case may be.[4]

It follows from the nature of this right that if the seller proves his debt, without first crediting the value of the goods, or if he accepts a composition for their price, he loses his right of stopping them.[5]

§ 362. **Order and Disposition.** — A very remarkable exception to the rule that the assignees of a bankrupt take only the property which is actually and beneficially his own is found in the statute of James I. which enacts that if any bankrupt have in his possession, order, and disposition, with the consent

[1] See remarks in Harman *v.* Fishar, Cowp. 117; James *v.* Griffin, 2 M. & W. 623; Grout *v.* Hill, 4 Gray, 361; Barnes *v.* Freeland, 6 T. R. 80; Neate *v.* Ball, 2 East, 117.

[2] See note 4, page 255.

[3] Clemson *v.* Davidson, 5 Binney, 392; Greaner *v.* Mullen, 15 Penn. St. 200: Sturtevant *v.* Orser, 24 N. Y. 538; Ash *v.* Putnam, 1 Hill, 302; Dean *v.* Compton, 2 N. B. R. 607.

[4] Wentworth *v.* Outhwaite, 10 M. & W. 436, per *Parke, Alderson,* and *Rolfe, B. B.,* against *Abinger, C. B.;* Stanton *v.* Eager, 16 Pick. 467, per *Shaw, C. J.;* Hause *v.* Judson, 4 Dana, 7; Newhall *v.* Vargas, 13 Maine, 93; Re Foot, 11 Blatch. 530, Fed. Cas. No. 4907; Schotsmans *v.* Lancashire Ry. Co., L. R. 2 Ch. 332, per *Cairns, L. J.;* Ex parte Middleton, 3 De G. J. & S. 201; Ex parte Chalmers, L. R. 8 Ch. 289; Ex parte Stapleton, 10 Ch. D. 586. But see Diem *v.* Koblitz, 49 Ohio St. 41; Tiffany, Sales, pp. 226 *et seq.*

[5] Nichols *v.* Hart, 5 C. & P. 179. See § 422.

of the true owner, any goods or chattels, whereof he shall be the reputed owner, and take upon himself the sale, alteration or disposition as owner, they shall go to his creditors.[1] This singular law appears to have remained unnoticed for a hundred years or more, but when it was rediscovered, it received from the courts a very wide construction, as in the leading case of Ryal *v.* Rolle,[2] where it was held that "goods or chattels" included unnegotiable *choses in action*, and that if these had been transferred without notice to the person indebted, they remained in the order and disposition of the bankrupt.

Of late years, the legislature and the courts have seemed less impressed than formerly with the wisdom of this enactment. Able judges have said that it would have been much better to leave all questions of fraud to be decided according to the merits of each case upon principles already well settled by the courts, and parliament has taken all *choses in action* excepting the trade debts of traders, out of the operation of the rule.[3]

The law of order and disposition does not obtain in the United States. If goods are left with the bankrupt for the express purpose of giving him a false credit, the assignees cannot retain them.[4] The creditors who have been actually deceived may, no doubt, have their own remedies.[4]

§ 363. **Title Incomplete.** — It was held that a bankrupt may make a written declaration of trust to satisfy the statute of frauds after the act of bankruptcy, a jury having found that the declaration accorded with the fact.[5] There was no equitable lien, but it was the bankrupt's undoubted moral duty to make the declaration, and as he performed it before the title accrued to the assignees except by relation, he was still the holder of the legal title. If at that time he had conveyed the

[1] 21 Jac. 1, c. 19, § 11.

[2] 1 Atk. 165.

[3] Robson, 7th ed., p. 515.

[4] Audenried *v.* Betteley, 5 Allen, 332; Sawyer *v.* Turpin, 91 U. S. 114, 121, per *Strong, J.* [For a further discussion of this subject, see Robson, Bankruptcy, 7th ed., title, Reputed Ownership; and Re Young, 25 L. R. Ire. 372; Re Lock, 8 Morrell, 51; Re Webber, 64 L. T. 426; Re Harrison, 10 Morrell, 1; Ex parte Murphy, 31 L. R. Ire. 465; Re Chapman, 1 Manson, 415; Re Peel (1894), 1 Ir. R. 235; Rutter *v.* Everett (1895), 2 Ch. 872; Re Seaman, 3 Manson, 19; Re Goetz (1898), 1 Q. B. 787.]

[5] Gardner *v.* Rowe, 5 Russ. 258.

property to a new trustee or to the *cestui que trust*, it is difficult to believe that any court would have set the deed aside. A trust which is good without writing can always be set up against trustees in bankruptcy.[1]

In all cases in which there could be any doubt of the propriety of the act whether it is to be done by the debtor or the assignees, it would be wise to consult the creditors, or the court after notice to creditors, and obtain their consent or a judicial order.

§ 364. **Property fraudulently held by Bankrupt.** — If the bankrupt has obtained possession of property by fraud, mistake, or in contempt of an order of court, the assignees must restore it, and the bankrupt may do so after his insolvency without being guilty of a preference; and his bankruptcy will not be a good defence to a suit for its recovery if it remains in his possession.[2] If the bankrupt is a fraudulent trustee of the property of a third person upon a secret trust, the creditors of that person have a better title than the assignees of the fraudulent trustee.[3]

§ 365. **Liability of Assignee to Principal.** — The specific property of a third person, or any property or securities into which it may have been converted, coming to the assignee, and all money received by him upon the sale, conversion, or collection of such property or securities, may be recovered of him by the true owner.[4] A banker or factor has power to give a valid pledge of his principal's goods or securities to an innocent person. If he does this, and his assignee in bankruptcy, after notice, settles with the third person, he will be responsible to the true owner for any surplus above the valid pledge which he might by due diligence have obtained. And so of any set-

[1] Sibley *v.* Quinsigamond Bank, 133 Mass. 515.

[2] Skip *v.* Harwood, 3 Atk. 564; Gladstone *v.* Hadwen, 1 M. & S. 517; Montgomery *v.* Bucyrus Works, 92 U. S. 257; Purviance *v.* Union Bank, 8 N. B. R. 447, Fed. Cas. No. 11,475; Load *v.* Green, 15 M. & W. 216; Cornfoot *v.* Fowke, 6 M. & W. 358; Noble *v.* Adams, 7 Taunt. 59; Ex parte Huth, 4 Deac. 294; Ex parte Cole, 3 M. D. & De G. 189; Mackworth *v.* Marshall, 3 Sim. 368; Donaldson *v.* Farwell, 93 U. S. 631, S. C. 5 Biss. 451, Fed. Cas. No. 3983; Ex parte Barnett, 3 Ch. D. 123. See Coryell *v.* Klehm, 157 Ill. 462.

[3] Pratt *v.* Wheeler, 6 Gray, 520.

[4] See cases cited *infra*, § 368, note 1; and Re Hallett (1894), 2 Q. B. 237; Knapstein *v.* Tinnette, 156 Ill. 322.

tlement he may make by which the rights of the true owner of property are lost or diminished.[1]

§ 366. **After acquired Property.** — By the law of England an undischarged bankrupt was incapable of holding property except for the use of his old creditors. This was part of a system which likened the decree in bankruptcy to a judgment, which was to be satisfied in preference to debts afterwards contracted. It led to great practical difficulties, because such bankrupts would enter into trade again, sometimes at a remote place, and the creditors of the new trade might be deceived.

By the statutes of 1869 and 1883 the doctrine is modified to give the bankrupt all his acquisitions after the close of the bankruptcy (which the courts have power to declare, though in fact no bankruptcy is ever finally closed), or his discharge, whichever event first occurs.

The rule in England is modified by decisions in several important particulars.

1. The assignees cannot claim the bankrupt's wages or salary,[2] though they could claim any money or property which came to him by descent, devise, or gift, or which he has acquired in trade.[3]

2. The bankrupt has a qualified interest in his after acquired property, which is good against all the world except his assignees, and it is, therefore, no defence to an action by him to recover any such debts, money or property, that he is a bankrupt, unless the assignees have forbidden the payment or transfer thereof to him.[4]

3. A new creditor taking security upon the newly acquired property can hold it against the assignees even if he was aware of the bankrupt's situation, if the assignees have not actually intervened.[5]

[1] Ex parte Cunningham, 3 Dea. & Ch. 58; Ex parte Solomons, ib. 77; Ex parte Wylie, ib. 82; Ex parte Nat. Bank of Scotland, 4 Dea. & Ch. 32; Ex parte Simpson, 1 Dea. 47.

[2] Robson, 7th ed., p. 426; Re Rogers (1894), 1 Q. B. 425; Mercer *v.* Vans Colina, 78 L. T. 21.

[3] Robson, 7th ed., p. 634.

[4] Herbert *v.* Sayer, 5 Q. B. 965; Ex parte Dewhurst, L. R. 7 Ch. 185.

[5] Cohen *v.* Mitchell, 7 Morrell, 207; Hunt *v.* Fripp, 5 Manson, 105. But this rule does not apply to real estate, Re New Land Assoc. (1892), 2 Ch. 188, nor to a controversy between trustees under two different bankruptcies, Re Clark (1894), 2 Q. B. 393.

4. If the assignees have knowingly permitted him to engage in trade, they are estopped to claim the fruits thereof in competition with his new creditors.[1]

In the United States, the title of the assignees stops with the adjudication, and all after acquired property belongs to the bankrupt, subject to be taken by his old creditors severally by the ordinary process of law, unless he shall receive his discharge, and by his new creditors, of course, in like manner.[2]

The English decisions, however, have exercised an unfortunate influence on some American cases, for they have been often cited as if they held that the bankrupt had a qualified interest in the property owned by him at the time of his bankruptcy unless the assignees chose to intervene, overlooking the fact that those decisions are confined to property acquired after the bankruptcy.

§ 367. **Advice of Creditors.**— Since assignees represent and act for creditors, almost any course of proceeding which the creditors are unanimous in asking will be taken.[3] Thus it was the practice to grant leave to the assignees to carry on the business of the debtor, if every creditor assented; though not if one or more objected. So the proceedings would be discontinued upon a like request. So of the appointment or removal of an assignee.[4]

Considering this, I doubt the soundness of a decision which refused to an assignee compensation beyond the statutory fees, notwithstanding the assent and agreement of every creditor.[5] There is no illegality in such an arrangement. The limit of fees was imposed for the benefit of the creditors, and they may waive it.

But not even the assent of all the creditors will authorize assignees to bring a suit whose sole purpose is to settle the priorities of secured creditors, if the equity of redemption is of no value whatever. The mistake of law in such a case would

[1] See *supra*, §§ 345, 350.

[2] Bennett *v.* Bailey, 150 Mass. 257.

[3] [But see Cochrane *v.* Bridendolph, 72 Md. 275].

[4] Act of 1867, §§ 13, 18, 14 Stat. 522, 525, R. I. §§ 5034, 5039.

[5] Cowing *v.* Altman, 1 T. & C. 494; 5 Hun, 556.

not prevent the assignees from being indemnified for costs out of the assets if they acted in good faith.

§ 368. **Bankrupt as Agent or Trustee.** — Property held by the debtor as trustee, agent, or however otherwise for a third person, does not vest in his trustees. The true owner may follow it so long as it can be traced, and may recover it of the trustees if they have received it or its distinguishable proceeds;[1] but he has no preferred claim as a creditor.[2]

If the agent or trustee before his bankruptcy has made good a misappropriation, though by an act unknown to the principal, it will be held good unless within the rule against preferences, which it would not usually be.[3]

In England, if a trustee or *quasi* trustee has mixed the trust moneys with his own in a single bank account, the courts will marshal the deposit as against the depositor's creditors, so as to give to the *cestui que trust* the balance remaining, without regard to the respective dates of the deposits and the checks. For they will assume that the drafts were honestly made by the agent against his own share of the account.[4] In the United States this point has until lately received but little judicial investigation. If the money is in fact kept separate, though without an earmark, it will belong to the principal,[5] but whether, if there be no such setting apart, the trustee can make good a deficit without being guilty of a preference is not clear. There

[1] Godfrey *v.* Furzo, 3 P. Wms. 185; Ex parte Chion, ib. 187 note; Price *v.* Ralston, 2 Dall. 60; Scott *v.* Surman, Willes, 400; Ex parte Moldaut, 3 Dea. & Ch. 351; Kip *v.* Bank of N. Y., 10 Johns. 63; Ex parte Pauli, 3 Dea. 169; Taylor *v.* Plumer, 3 M. & S. 562; Ex parte Rogers, 8 De G. M. & G. 271; Veil *v.* Mitchell, 4 Wash. C. C. 105, Fed. Cas. No. 16,908; Cook *v.* Tullis, 18 Wall. 332; Fisher *v.* Henderson, 8 N. B. R. 175, Fed. Cas. No. 4820; Denston *v.* Perkins, 2 Pick. 86; Ex parte Gillett, 3 Mad. 28; Ex parte Cooke, 4 Ch. D. 123; Re Hulton, 8 Morrell, 69.

[2] Hosmer *v.* Jewett, 6 Ben. 208, Fed. Cas. No. 6713; Anderson *v.* Tuttle, 26 N. J. Eq. 144; 28 N. J. Eq. 449. See § 365.

[3] Ex parte Sayers, 5 Ves. 169; Pinkett *v.* Wright, 2 Hare 120; s. c. *nom.* Murray *v.* Pinkett, 12 Cl. & Fin. 764; Whitecomb *v.* Jacob, 1 Salk. 160; Cook *v.* Tullis, 18 Wall. 332; Re Dodds, 8 Morrell, 86; New's Trustee *v.* Hunting (1897), 2 Q. B. 19.

[4] See Pennell *v.* Deffell, 4 De G. M. & G. 372; Frith *v.* Cartland, 2 H. & M. 417; Re West of England Bank, 11 Ch. D. 772; Ex parte Cooke, 4 Ch. D. 123; Re Hallett's Estate 13 Ch. D. 696; Harris *v.* Truman, 7 Q. B. D. 340.

[5] Kip *v.* Bank of N. Y., 10 Johns. 63; Birt *v.* Burt, 11 Ch. D. 773 note; Hancock *v.* Smith, 41 Ch. D. 456.

are a few late cases which hold that a fiduciary debt creates a lien on the general assets.[1] But this doctrine is unsound.[2]

§ 369. **Suits by Bankrupt as Trustee.** — A bankrupt may maintain an action in his own name as trustee to recover a debt which he had lawfully transferred before his bankruptcy or in any other case in which he is a trustee.[3] If he has pledged or conveyed by delivery or otherwise a note or other property in a mode which will give a lien or title in equity to his transferree, he may complete the legal title after his bankruptcy or his trustees may do so, or may be required by the court of bankruptcy or a court of equity to do so.[4]

If the case is a clear one and no discovery is needed, a court of equity may refuse to entertain a bill by the third party *quia timet*, on the ground that, even at law, equitable defences are sufficient against trustees in bankruptcy.[5] In such cases, therefore, trustees in bankruptcy of the legal holder of the claim can maintain no action even at law.[6]

§ 370. **Onerous Property.** — A doctrine of the English law which has been adopted here is that assignees are not bound to take onerous property, that is, property which would bind them to pay money or enter into obligations which in their opinion would be of disadvantage to the creditors; but that they had an election to take or reject such property. This rule, too, as established by the courts, has led to misapprehension. In the leading case presently to be mentioned, the King's Bench held that onerous property remained in the

[1] People *v.* City Bank, 96 N. Y. 32; McLeod *v.* Evans, 66 Wis. 401; Harrison *v.* Smith, 83 Mo. 210.

[2] See Phil. Nat. Bank *v.* Dowd, 38 Fed. Rep. 172 and cases.

[3] Winch *v.* Keeley, 1 T. R. 619; Wood *v.* Owings, 1 Cranch, 239; Ex parte Mowbray, 1 Jac. & W. 428; Watkins *v.* Maule, 2 Jac. & W. 237; Tucker *v.* Daly, 7 Gratt. 330; Partee *v.* Corning, 9 La. An. 539; Ex parte Douglas, 3 Dea. & Ch. 310; Webster *v.* Scales, 4 Doug. 7; Carpenter *v.* Marnell, 3 B. & P. 40; Blin *v.* Pierce, 20 Vt. 25; Hopkins *v.* Banks, 7 Cow. 650; Tibbits *v.* George, 5 A. & E. 107; Parnham *v.* Hurst, 8 M. & W. 743; D'Arnay *v.* Chesneau, 13 M. & W. 796; Ex parte Byas, 1 Atk. 124.

[4] Ex parte Greening, 13 Ves. 206; Ex parte Price, 3 M. D. & De G. 586; Smith *v.* Pickering, Peake, 50; Ex parte Pike, 40 L. T. 529; Anon. 1 Camp. 492; Lempriere *v.* Pasley, 2 T. R. 485; Fogg *v.* Willcutt, 1 Cush. 300; Ex parte Rhodes, 2 Dea. 364; 3 Mont. & A. 217.

[5] Ex parte Painter, 2 Dea. & Ch. 584; Ex parte Gennys, Mont. & McA. 258.

[6] Morton *v.* Austin, 12 Cush. 389.

bankrupt until the assignees exercised their election. This rule has been supposed to favor the view that whatever the assignees did not choose to take, whether really onerous or not, remained in the bankrupt.

§ 371. **What Property is Onerous.** — The following description of onerous property in the English statute[1] is substantially declaratory of the law as laid down in earlier decisions. "Land of any tenure burdened with onerous covenants,[2] of unmarketable shares in companies,[3] of unprofitable contracts,[4] or of any other property that is unsalable, or not readily salable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money." "Shares or stock in companies" in this connection means such as are subject to calls, or assessments, for which the owner is personally bound, or such as render the owner responsible for debts of the company.

In most of our companies the shares are not onerous, for while the law is substantially like that of England, and makes the shareholders liable to pay the full nominal value of their shares, it is usual to make these payments rather than to trade on a capital.

§ 372. **Leaseholds; Copeland v. Stephens.** — In the leading case of Copeland *v.* Stephens,[5] it was held that a term of years remains in the bankrupt until the assignees accept it. The decision in this case which is called by Eden a luminous and ingenious judgment has been generally followed in this country.[6] It has had two unfortunate consequences. It has left the bankrupt liable to debts and obligations without the means of satisfying them; and has obscured the true principle of.

[1] 32 & 33 Vict. ch. 71, § 23.

[2] Robson, 7th ed. p. 467.

[3] South Staffordshire Ry. Co. *v.* Burnside, 5 Ex. 129; Martin's Anchor Co. *v.* Morton, L. R. 3 Q. B. 306; Hastie's Case, L. R. 7 Eq. 3; L. R. 4 Ch. 274; Metrop. Bank *v.* Offord, L. R. 10 Eq. 398; Levi *v.* Ayers, 3 App. Cas. 842.

[4] Re Sneezum, 3 Ch. D. 463; Ex parte Bridger, 1 Dea. 581; Hope *v.* Booth, 1 B. & Ad. 498; Boorman *v.* Nash, 9 B. & C. 145.

[5] 1 B. &. Ald. 593.

[6] Hoyt *v.* Stoddard, 2 Allen, 442; Re Ten Eyck, 7 N. B. R. 26, Fed. Cas. No. 13,829; Beall *v.* Dushane, 149 Pa. St. 439. See Dushane *v.* Beall, 161 U. S. 513.

the vesting of all the bankrupt's property in the assignees, and has induced bankrupts and their creditors to suppose that whatever was not claimed by the assignees belonged to the bankrupt.

Late statutes in England have so changed the law as to vest onerous property in the assignees, subject to their right of disclaimer and to relieve the bankrupt whether they disclaim or not. This puts the doctrine on a just and intelligible basis.[1]

§ 373. **Acceptance of Onerous Property by Assignees.** — The question whether, in a given case in which there has been no application to the court, the assignees have accepted onerous property is one of fact. The recent decisions require, in order to charge assignees with the payment of rent or other dues, some unequivocal act on their part proving their intent to adopt the property. Such an act is an acceptance.[2] No mere neglect to act is accounted an act, and it has been held that offering a lease for sale, accepting rent from an under-tenant, keeping the bankrupt's goods upon the premises, and paying rent from time to time to save a distress, are not, as matter of law, an acceptance.[3] Some of the earlier authorities are less liberal to the assignees.[4]

§ 374. **Rejected Property.** — There is very respectable authority in the United States for the proposition to the effect that the bankrupt owns all property, whether onerous or not, which his assignees have refused or intentionally neglected to take[5] and that creditors may set aside fraudulent conveyances

[1] Robson, 7th ed. p. 460. [If the trustee does not intervene, the bankrupt may dispose of the lease. Re Clayton's Contract (1895), 2 Ch. 212.]

[2] Hanson *v.* Stevenson, 1 B. & Ald. 303; Ex parte Dressler, 9 Ch. D. 252; Ansell *v.* Robson, 2 C. & J. 610; Young *v.* Peyser, 3 Bosw. 308; Astor *v.* Lent, 6 Bosw. 612; Morton *v.* Pinckney, 8 Bosw. 135.

[3] Goodwin *v.* Noble, 8 E. & B. 587; Hill *v.* Dobie, 8 Taunt. 325; Comm *v.* Franklin Ins. Co., 115 Mass. 278; Dorrance *v.* Jones, 27 Ala. 630; Lindsay *v.* Limbert, 12 Moore, 209; Wheeler *v.* Bramah, 3 Camp. 340; Turner *v.* Richardson, 7 East, 335; Hastings *v.* Wilson, Holt, N. P. 290; How *v.* Kennett, 3 A. & E. 659; Lewis *v.* Burr, 8 Bosw. 140; Ex parte Washburn, 11 N. B. R. 66, Fed. Cas. No. 17,211; Re Baker, 8 Morrell, 116.

[4] See Welch *v.* Myers, 4 Camp. 368.

[5] See Towle *v.* Davenport, 57 N. H. 149; Towle *v.* Rowe, 58 N. H. 394; Amory *v.* Lawrence, 3 Clifford, 523, Fed. Cas. No. 336; Nash *v.* Simpson, 78 Maine, 142.

if the assignees do not see fit to act, and the special statute of limitations has barred the assignees.[1]

Notwithstanding these decisions, the principle of law is clear that all property not onerous vests absolutely in the trustees, and cannot be divested by mere neglect,[2] unless when there is estoppel for the benefit of innocent purchasers.

But no mere lapse of time, though it should be thirty years or more, will prove abandonment as against the bankrupt himself, or his fraudulent grantee, or any one whose interests have not been injuriously affected by the delay.[3] If the statute of limitations does not apply to the case, the assignees may recover such property at any time. The statute does not apply in favor of the bankrupt himself, because his relation is fiduciary.

Knowledge of property which is omitted from the schedules is not attributed to the assignee, and if he was in fact ignorant of his rights in such a case, they will be preserved, even against a purchaser from the bankrupt, because the purchaser had at least constructive knowledge of the bankruptcy.[4]

The prudent course for assignees is to apply to the court promptly for leave to disclaim onerous property, upon due notice to creditors. If the assignees fail to apply, the other party or parties interested would do well to file a petition. The courts of bankruptcy in this country may make all necessary orders in such cases, under their equitable jurisdiction, though the statute should neglect to deal with the subject.

§ 375. **Accepted Property.** — If the assignees accept a lease, they become bound by the covenants so long as they remain the owners of the term,[5] but no longer, because they are bound by privity of estate and not of contract. The ordinary covenant not to assign is relaxed in their favor, and they may therefore, sell the term at any time and thus escape further

[1] Davis *v.* Lumpkin, 57 Miss. 506.

[2] Minot *v.* Tappan, 122 Mass. 535; Kenyon *v.* Wrisley, 147 Mass. 476.

[3] Penny *v.* Pickwick, 16 Beav. 246; Roseboom *v.* Mosher, 2 Denio, 61; Gay *v.* Kingsley, 11 Allen, 345.

[4] Cole *v.* Coles, 6 Hare, 517; Hall *v.* Whiston, 5 Allen, 126.

[5] Powell *v.* Lloyd, 2 Y. & J. 372; Wilkins *v.* Fry, 1 Mer. 244; Robson, 7th ed. p. 469.

liability.[1] So, it seems, they may sell shares, or abandon a contract, and relieve themselves for the future.[2]

They have no right to insist that a purchaser from them shall indemnify the bankrupt for his liability upon any covenants or undertakings which are not relieved by his bankruptcy, because they are bound to obtain the best results for the creditors without regard to the personal interests of the bankrupt.[3]

§ 376. **Rejected Lease.** — If the term is rejected, the landlord can recover in the court of bankruptcy a sum *quantum meruit* for any actual occupation by the messenger and the trustees.[4] This is an equitable practice adopted by the courts of bankruptcy and applied even in cases where the lease being under seal, there could be no action for use and occupation at law.[5] Under this practice, the amount is not necessarily the same as the rent reserved.[6] This is in the nature of expenses, and therefore a charge upon the assets, but the landlord has no right to distrain for it.[7]

§ 377. **Trustees under a Deed of Arrangement.** — In England trustees for creditors under a deed or act of the party or under insolvent laws where the petition is filed by the debtor, are held bound to accept onerous property, which is part of the assigned premises, without privilege of election.[8] This rule does not apply to deeds, which, by statute, are to operate like decrees in bankruptcy,[9] and in one case where it was contended that the

[1] Onslow *v.* Corrie, 2 Mad. 330; Robson, 7th ed. p. 469.

[2] See Gallup *v.* Fox, 64 Conn. 491; Re Sneezum, 3 Ch. D. 463. [This is apparently changed in England by B. A. 1883, § 55, sub-s. 4.]

[3] Wilkins *v.* Fry, 1 Mer. 244.

[4] Re Webb, 6 N. B. R. 302, Fed. Cas. No. 17,315; Re Butler, 6 N. B. R. 501, Fed. Cas. No. 2236; Re Metz, 6 Ben. 571, Fed. Cas. No. 9509; Re Lynch, 7 Ben. 26, Fed. Cas. No. 8634; Re Hamburger, 12 N. B. R. 277, Fed. Cas. No. 5975; Re Hufnagel, 12 N. B. R. 554, Fed. Cas. No. 6837; Re Lucius Hart Mfg. Co. 17 N. B. R. 459, Fed. Cas. No. 8592; Re Breck, 12 N. B. R. 215, Fed. Cas. No. 1822; Re Commercial Bulletin Co., 2 Woods, 220, Fed. Cas. No. 3060.

[5] Gabriel *v.* Blankenstein, 13 Q. B. D. 684.

[6] Cases *supra*, note 1, and Ex parte Isherwood, 22 Ch. D. 384.

[7] Bailey *v.* Loeb, 2 Woods, 578, Fed. Cas. No. 739.

[8] White *v.* Hunt, L. R. 6 Ex. 32, overruling an early case at *Nisi Prius;* Doe *v.* Andrews, 4 Bing. 348; Jones *v.* Binns, 10 Jur. N. S. 119; Metropolitan Bank *v* Offord, L. R. 10 Eq. 398.

[9] Porter *v.* Kirkus, L. R. 2 C. P. 590.

deed was irregular, and could take effect only by the common law, the judges disregarded this point, and held that the trustees might elect to take or decline onerous shares.[1]

In this country it is held that trustees for creditors, though by deed or voluntary bankruptcy, need not take onerous property.[2] But it is said that an acceptance of a trust created by deed, with full knowledge that a term of years is part of the property assigned, may be an acceptance of the term.[3]

§ 378. **Assignees may Enforce a Contract for Lease.** — Though the utter insolvency of one who has agreed to take a lease may be ground for refusing him a decree for specific performance, because his covenants have become worthless,[4] yet, if he is actually bankrupt, his assignees are in a better position, and may elect to enforce the contract, because they have the right to take onerous property and sell it for the benefit of the creditors.[5] If, however, the contract requires the lessee to enter into covenants which the assignees do not choose to assume, they cannot have specific performance,[6] nor can they if the contract is personal to the lessee, as where a mother agreed to demise a house to her son for his own occupation.[7]

§ 379. **Disclaimer, Effect of.** — If the trustees disclaim onerous property, they cannot claim its benefits, such as the return of a deposit or of money expended in anticipation of a lease.[8] Trustees disclaiming can take the rent of sub-tenants only to the time of the bankruptcy and the landlord may, in equity, recover subsequently accruing rents.[9] If they disclaim a term,

[1] Levi *v.* Ayers, 3 App. Cas. 842.

[2] Pratt *v.* Levan, 1 Miles, 358; Journeay *v.* Brackley, 1 Hilt. 447; Martin *v.* Black, 9 Paige, 641; Comm. *v.* Franklin Ins. Co., 115 Mass. 278.

[3] See Bagley *v.* Freeman, 1 Hilt. 196; Young *v.* Peyser, 3 Bosw. 308; Astor *v.* Lent, 6 Bosw. 612; Lewis *v.* Burr, 8 Bosw. 140; Dennistoun *v.* Hubbell, 10 Bosw. 155.

[4] Boardman *v.* Mostyn, 6 Ves. 467; Brooke *v.* Hewitt, 3 Ves. 253; Buckland *v.* Hall, 8 Ves. 92; O'Herlihy *v.* Hedges, 1 Sch. & Lef. 123.

[5] Buckland *v.* Papillon, L. R. 1 Eq. 477; L. R. 2 Ch. 67.

[6] Fry, Specif. Perf., 3rd ed. § 949; Powell *v.* Lloyd, 1 Y. & J. 427.

[7] Flood *v.* Finlay, 2 Ball & B. 9.

[8] Ex parte Barrell, L. R. 10 Ch. 512; Kane *v.* Jenkinson, 10 N. B. R. 316, Fed. Cas. No. 7607; Ex parte Ladd, 3 Dea. & Ch. 647.

[9] Haley *v.* Boston Belting Co., 140 Mass. 73, citing Story Eq. § 687; Fonbl. Eq. c. 3, § 3, & c. 5, § 5; Goddard *v.* Keate, 1 Vern. 87; Wylie *v.* Smith, 2 Woods, 673, Fed. Cas. No. 18,110.

they cannot afterwards remove trade fixtures,[1] unless the provisions of the lease give the lessee such right upon the determination of the lease in whatever mode.[2] It has been doubted in England whether, after removing fixtures, the assignees can disclaim, unless under one of the leases last mentioned.[3] But it is to be noted that the late statutes in England make the surrender relate back to the adjudication. If, instead of disclaiming, the trustees and landlord agree for a surrender, the trustees will have all the rights which the bankrupt would have had on a similar surrender.[4]

§ 380. **Unfinished Contracts.** — The assignees having the right to complete beneficial contracts, not involving personal qualities, a seller of goods for cash must tender them to the assignees of the buyer, though this obligation may involve him in expense without a certainty of reimbursement.[5] If goods are agreed to be sold on credit, and the buyer is bankrupt, the assignees may take the goods, if they will pay cash for them, because the right of the seller is only to a lien for the price; but the duty of tender or notice is upon the assignees, and a failure on their part to give notice within a reasonable time will be evidence of abandonment.[6] If the goods are to be forwarded with bills of exchange for acceptance, they should be sent, because the court has power to authorize the bills to be accepted by the assignees, if that course is beneficial to the creditors.[7] If the seller has in such case drawn bills on a bank under a letter of credit which required him to forward bills of lading,

[1] Kearsey *v.* Carstairs, 2 B. & Ad. 716; Ex parte Hope, 3 De G. & J. 92.

[2] Ex parte Maundrell, 2 Mad. 315; Ex parte Nixon, 1 Rose, 445; Stansfeld *v.* Mayor of Portsmouth, 4 C. B. N. S. 120; Sumner *v.* Bromilow, 34 L. J. Q. B. 130.

[3] See *dicta* in Saint *v.* Pilley, L. R. 10 Ex. 137; Ex parte Brook, 10 Ch. D. 100.

[4] Saint *v.* Pilley, L. R. 10 Ex. 137.

[5] Gibson *v.* Carruthers, 8 M. & W. 321; N. E. Iron Co. *v.* Gilbert R. R. Co., 91 N. Y. 153; Pardee *v.* Kanady, 1 Cent. Rep. 250.

[6] Bloxam *v.* Sanders, 4 B. & C. 941, 949, per *Bayley, J.*; Morgan *v.* Bain, L. R. 10 C. P. 15; Re Phœnix Bessemer Steel Co., 4 Ch. D. 108; Ex parte Stapleton, 10 Ch. D. 586; Ex parte Chalmers, L. R. 8 Ch. 289; Hobbs *v.* Columbia Falls Brick Co., 157 Mass. 109; Bloomer *v.* Bernstein, L. R. 9 C. P. 588; Re Wheeler, 2 Lowell, 252, Fed. Cas. No. 17,488.

[7] Ex parte Tondeur, L. R. 5 Eq. 160.

the insolvency of the bank after acceptance will not excuse his failure to forward the bills of lading.[1]

§ 381. **Shares in Companies; Laches.** — Receiving and offering for sale shares of a corporation, or even attending and voting at a meeting is not *per se* an acceptance of the title.[2] Whether the assignees or the company are bound to take the first step will depend on the bylaws. If these require no notice of calls or notice only to the registered owners, the assignees may lose their rights by forfeiture for non-payment, if they have neglected to register, though they have had no notice of the calls.[3]

Delay in asserting their rights may estop the assignees if there has been a serious change in the market or other intervening equity.[4]

§ 382. **Negligence of Assignees.** — Besides a liability for intentional breaches of trust, assignees have been required to indemnify creditors for a loss happening through their negligence; as where a creditor lost his dividend by the accidental omission of his name from the dividend sheet;[5] or where a loss arose from an unauthorised sale upon credit, or through the default of an agent.[6] In such cases the trustees may have contribution from each other if some have made good more than their share of loss.[7] They will not be held responsible for errors of judgment or even mistakes of law in doubtful matters.[8] Trustees cannot delegate any of their discretionary powers.[9] They are not responsible for agents necessarily employed, for instance in foreign countries, nor for brokers and other intermediaries usually engaged in selling and collecting, if there has been no personal negligence by the trustees.[10]

[1] Ex parte Agra Bank, L. R. 9 Eq. 725. No question of stoppage *in transitu* was pertinent to the case.

[2] Gray *v.* Coffin, 9 Cush. 192; American File Co. *v.* Garrett, 110 U. S. 288; affirming Garrett *v.* Sayles, 1 Fed. Rep. 371.

[3] Graham *v.* Van Diemen's Land Co., 11 Ex. 101; 1 H. & N. 541; Re Lond. & Prov. Tel. Co., L. R. 9 Eq. 653.

[4] Lawrence *v.* Knowles, 5 Bing. N. C. 399; Re Lond. & Prov. Tel. Co., L. R. 9 Eq. 653.

[5] Ex parte Hall, 1 De G. 555.

[6] Ex parte Brutton, 1 De G. 116; Lingard *v.* Bromley, 1 Ves. & B. 114.

[7] Lingard *v.* Bromley, 1 Ves. & B. 114.

[8] Ex parte Ogle, L. R. 8 Ch. 711.

[9] Douglas *v.* Browne, Mont. 93.

[10] 2 Bell, Com., 7th ed., 323.

§ 383. **Assignees are Fiduciaries.** — Trustees in bankruptcy like other trustees have all the title and power of the bankrupt. Their fiduciary character makes it inequitable for them to buy any of the trust property or prospective dividends; if they are secured creditors, they can take no part in selling the property with a view to proving for the deficiency.[1]

§ 384. **Joint Assignees.** — They are not responsible for each other,[2] unless they have either acted or held themselves out as acting jointly in the particular matter in question, or have submitted to an order which implies joint liability.[3]

They must all join in making sales, compromises, etc.;[4] but if some of them refuse to do a reasonable and beneficial act, the court of bankruptcy may order them to join, or may remove them; or they may be made defendants, in equity, to suits brought by the others.[5] In summary petitions in bankruptcy it is sufficient if an assignee who refuses to join is served with notice of the petition.[6]

§ 385. **Liability of Assignees.** — Trustees are personally liable upon all their own undertakings. Thus if they have accepted a term of years they and their executors are bound by the covenants of the lease, until they have parted with their estate in the premises;[7] they are personally bound for the charges of the messenger and solicitor and other expenses of the proceedings, incurred after their appointment; so for any promises or covenants which they may make;[8] and it is no defence that they have received no funds.[7,8]

They are responsible in trover or other appropriate form of

[1] Pooley *v.* Quilter, 2 De G. & J. 327.

[2] Primrose *v.* Bromley, 1 Atk. 89; Abbott *v.* Fisher, 124 Mass. 414; Ex parte Dawson, 4 Dea. & Ch. 130; Ex parte Ridley, 3 M. D. & De G. 413; Ex parte Benham, 1 Dea. 26.

[3] Ex parte Winnall, 3 Dea. & Ch. 22; Ex parte Booth, Mont. 248.

[4] Ex parte Smith, 1 Dea. 385; Ex parte Underhill, 3 Dea. 326.

[5] Ex parte Evans, 3 Dea & Ch. 470.

[6] See Ex parte Burn, 1 Dea. 194; Re Fosbrooke, 1 M. D. & De G. 533; Ex parte Randall, 1 M. D. & De G. 562; Ex parte Brereton, 3 M. D. & De G. 614.

[7] Abercrombie *v.* Hickman, 8 A. & E. 683; Hanson *v.* Stevenson, 1 B. & Ald. 303. Ex parte Dressler, 9 Ch. D. 252.

[8] Stephens *v.* Pell, 4 Tyrwh. 6; Pell *v.* Stephens, 2 Myl. & K. 334; Chilson *v.* Adams, 6 Gray, 364; Ex parte Hartop, 9 Ves. 109; Hart *v.* Biggs, Holt, N. P. 245; Ex parte Johnson, 1 Gl. & J. 23; Ex parte Coates, 3 Dea. & Ch. 626.

action for the property of third persons which comes to their possession; and for acts injurious to third persons.[1] It is held, however, that if receivers are authorized to operate a railroad, they are liable to an action for damages occurring through the negligence of their servants only as receivers, that is, to charge the funds in their hands and not themselves.[2] And that if, without notice, trustees have dealt with the property of a third person and have gone on in good faith and divided all the assets, they may plead *plene administravit*.[3]

§ 386. **Revocation by Bankruptcy.** — The decree which vests the bankrupt's property in his trustees revokes all agencies and powers given by him, unless such as are held by creditors or purchasers in connection with some valid interest in property, or, as the phrase is, "powers coupled with an interest." Assignees, says Sir George Rose, are affected by the equities, but not bound by the covenants of the bankrupt.[4] The test therefore is whether the creditor has an equitable lien upon or other valid interest in the property of the bankrupt; if not, the vesting order is a revocation.

§ 387. **Licenses and Covenants.** — A mere license or covenant or even power by act of Parliament to a creditor to distrain or seize chattels, if the true construction be that the interest depends upon the entry and seizure, cannot be availed of after the property is changed.[5] This is clearly pointed out by Lord Westbury in Reeve *v.* Whitmore,[6] "A present contract that the mortgagee shall have a right and an interest

[1] Aldridge *v.* Johnson, 7 E. & B. 885; Ex parte Simpson, 2 Mont. & A. 294; Ex parte Nat. Bank Scotland, 1 Mont. & A. 644; Ex parte Morton, 5 Ves. 449; Leighton *v.* Harwood, 111 Mass. 67; Ex parte Bond, 1 M. D. & De G. 10; Ex parte Cotterell, 3 Dea. 12; Ex parte Cunningham and three other cases, 3 Dea. & Ch. 58 to 87; Re Wiley, 4 Biss. 171, Fed. Cas. No. 17,655.

[2] See High, Receivers (3d ed.), §§ 395 to 398 b.

[3] Ex parte Havens, 8 Ben. 309, Fed. Cas. No. 6230; Allen *v.* Whittemore, 8 Ben. 485, Fed. Cas. No. 241.

[4] Ex parte King, 1 Mont. D. & De G. 119.

[5] Freeman *v.* Edwards, 2 Ex. 732; Fuller *v.* Emerson, 7 Cush. 203; Re Dyke, 9 N. B. R. 430; Fed. Cas. No. 4227; Belding *v.* Read, 3 Hurlst. & C. 955; Howes *v.* Ball, 7 B. & C. 481; Ex parte Hill, 6 Ch. D. 63; Tripp *v.* Armitage, 4 M. & W. 687; Jolly *v.* Arbuthnot, 4 De G. & J. 224; Rouch *v.* Great Western Rwy. Co., 1 Q. B. 51; Ex parte Barter, 26 Ch. D. 510.

[6] 4 De G. J. & S. 1, 18, referred to by the Court in Brown *v.* Bateman, L. R. 2 C. P. 272, 283.

attaching immediately by force of the contract upon all that property which *in futuro* may be brought on the premises, is clearly different from a contract that the mortgagee shall have a power of entering upon the premises for the purpose of seizing and taking possession of that future property. . . . A power, however, is very different from an interest; and if the extent and limit of the contract be merely that the mortgagee shall have such a power, then an interest will not arise under the power till the power is exercised."

§ 388. **Agreements between Landlord and Tenant.** — An agreement that a landlord may take chattels as additional security for his rent is not binding until seizure, in those jurisdictions in which the law gives no right of distress.[1] But removable trade fixtures may be thus secured to the landlord, though not to third persons, because being affixed to the soil, the world has notice that the right of removal depends upon the terms of the lease.[2] And in several of the Southern States a lien may be given upon growing crops without possession, and such lien binds the trustees.[3]

In England a mortgagor of land may attorn tenant to his mortgagee to the extent of the fair value of one year's rent, that being the limit of distress in case of bankruptcy.[4] An agreement for more will be voidable by the trustees as a fraud on the bankrupt law.[5]

§ 389. **Directions and Orders.** — A mere direction to an agent or consignee to pay money to a creditor, not communicated to the creditor so as to create an equitable lien, is revoked by the assignment.[6] A usage to permit insurance brokers

[1] Re Morrow, 1 Lowell, 386, Fed. Cas. No. 9850; Re Dyke, 9 N. B. R. 430, Fed. Cas. No. 4227.

[2] Re Morrow, 1 Lowell, 386, Fed. Cas. No. 9850.

[3] Wylie *v.* Smith, 2 Woods, 673, Fed. Cas. No. 18,110; McLean *v.* Klein, 3 Dillon, 113, Fed. Cas. No. 8884.

[4] Morton *v.* Woods, L. R. 4 Q. B. 293; Re Stockton Iron Furnace Co., 10 Ch. D. 335; Ex parte Punnett, 16 Ch. D. 226; Ex parte Voisey, 21 Ch. D. 442.

[5] Ex parte Williams, 7 Ch. D. 138; Ex parte Jay, 14 Ch. D. 19; Ex parte Jackson, 14 Ch. D. 725.

[6] Scott *v.* Porcher, 3 Meriv. 652; Ex parte Perry, 3 M. D. & De G. 252; Ungewitter *v.* Von Sachs, 4 Ben. 167, Fed. Cas. No. 14,343; Morrell *v.* Wootten, 16 Beav. 197. See Yeates *v.* Groves, 1 Ves. 280; Yates *v.* Hoppe, 9 C. B. 541; Ex parte Hankey, 4 Dea. 1; McMenomy *v.* Ferrers, 3 Johns. 71; Tibbits *v.* George, 5 A. & E. 302; Peyton *v.*

to set off losses and return premiums against their personal liability for the premiums is revoked by the bankruptcy of the underwriter, if the broker has no personal interest by way of lien or otherwise in these losses.[1] A covenant that the proceeds arising out of a contract of the debtor with a third person shall be paid to a creditor, though it be valid and be acted on to the time of the bankruptcy, will not bind the trustees to pay money which they earn by carrying out the contract; because the bankrupt cannot covenant for the future action or earnings of his trustees.[2]

§ 390. **Naked Powers.** — A mere power to a creditor to collect a debt or deal with a chose in action may be considered revoked unless it can be fairly gathered from the whole transaction that an interest in the chose itself was intended to be given. In some of the cases cited in the note, the revocation was by death, or by a conveyance of the property to a purchaser with notice. The fact that the power purports to be irrevocable will not of itself make it so.[3] It should be noted in this connection that, *prima facie*, a power to a creditor to collect a debt for his own use is an assignment. Some of the cases in the last note may seem to overlook this;[4] and an order to the debtor's debtor to pay out of a particular fund, if communicated to the creditor creates a lien.[5]

§ 391. **Power coupled with an Interest.** — Any power or license which is part of or in aid of a grant, security or lien, legal or equitable, is not revoked by bankruptcy. Of this the

Hallett, 1 Caines, 363; Alley *v.* Hotson, 4 Camp. 325; Ex parte Steward, 3 M. D. & De G. 265; Re Whitlock, 1 Manson, 33.

[1] Minett *v.* Forrester, 4 Taunt. 541; Parker *v.* Smith, 16 East, 382.

[2] Ex parte Mackay, L. R. 8 Ch. 643; Wiltshire Iron Co. *v.* Great Western Rwy. Co., L. R. 6 Q. B. 101; Ex parte Nichols, 22 Ch. D. 782; Ellis *v.* Boston, Hartford, & Erie R. R. Co., 107 Mass. 1, 30, per *Wells, J.*

[3] See Hovill *v.* Lethwaite, 5 Esp. 158; Howes *v.* Ball, 7 B. & C. 481; Goodsell *v.* Benson, 13 R. I. 225; Hunt *v.* Ronsmanier, 2 Mason, 342, Fed. Cas. No. 6898, 8 Wheat. 174, 3 Mason, 294, Fed. Cas. No. 6897; Webb *v.* Walker, 7 Cush. 46; Langdon *v.* Langdon, 4 Gray, 186; Kempton *v.* Bray, 99 Mass. 350.

[4] Gerrish *v.* Sweetser, 4 Pick. 374; Matheson *v.* Rutledge, 12 Richardson (S. C.) 41; Hutchinson *v.* Heyworth, 9 A. & E. 375; Diplock *v.* Hammond, 2 Sm. & Giff. 141.

[5] Ex parte Kirk, 1 Atk. 107; McMenomy *v.* Ferrers, 3 Johns. 71; Legro *v.* Staples, 16 Maine, 252; Patten *v.* Wilson, 34 Penn. St. 299; Lowery *v.* Steward, 25 N. Y. 239.

most usual illustration is a power of sale contained in a mortgage.[1]

In building contracts it is often stipulated that the owner of the premises may have or use materials of the builder as security for advances or to complete the contract on default. If the owner is in possession of the land and the contract gives him a lien as soon as the materials are brought upon the land, it will be valid.[2] If not, and, if the time for seizure has not come, or if the seizure is not made before the title of the trustees accrues, the creditor's right is gone.[3] In all these cases, a seizure made in pursuance of the contract before the title is changed will be respected.[4]

§ 392. **Bankruptcy does not revoke a Will.** — The decree does not revoke the bankrupt's will, because there may be assets at the death of the bankrupt upon which it will operate,[5] nor a statutory power to an assignee in an earlier insolvency to seize any property which does not come within the scope of the decree in bankruptcy, such as property acquired after the discharge;[6] nor a covenant to settle such property.[7] If, however, the bankrupt law is broad enough to admit proof of damages under such a covenant, the debt will be discharged, if the bankrupt receives his certificate, and the collateral covenant though not revoked, will be discharged.[8]

A power will not be revoked by relation to an act of bankruptcy committed in the country unless it was known to the

[1] Jones, Mortgages, 5th ed. §§ 1793 a; Dixon *v.* Ewart, 3 Meriv. 322; Hall *v.* Bliss, 118 Mass. 554; Calloway *v.* People's Bank, 54 Ga. 441; Lightner's Appeal, 82 Penn. St. 301; Smart *v.* Sandars, 5 C. B. 895.

[2] Brown *v.* Bateman, L. R. 2 C. P. 272; Ex parte Newitt, 16 Ch. D. 522; Hawthorn *v.* Newcastle R. Co., 3 Q. B. 734 note; Crowfoot *v.* Lond. Dock Co., 2 C. & M. 637; Manton *v.* Moore, 7 T. R. 67.

[3] Tripp *v.* Armitage, 4 M. & W. 687; Rouch *v.* Great Western Rwy. Co., 1 Q. B. 51; Ex parte Barter, 26 Ch. D. 510; Ex parte Jay, 14 Ch. D. 19; Reeve *v.* Whitmore, 4 De G. J. & S. 1; Carr *v.* Allatt, 27 L. J. Ex. 385.

[4] Krehl *v.* Great Central Gas Co., L. R. 5 Ex. 289; Hope *v.* Hayley, 5 E. & B. 830; Re Waugh, 4 Ch. D. 524; Re Styan, 1 Phil. 105; Young *v.* Hope, 2 Ex. 105.

[5] Charman *v.* Charman, 14 Ves. 580.

[6] Ex parte Pain, L. R. 3 Ch. 639; Lavender *v.* Gosnell, 43 Md. 153.

[7] Lyde *v.* Mynn, 4 Sim. 505; 1 Myl. & K. 683.

[8] Collyer *v.* Isaacs, 19 Ch. D. 343; Thompson *v.* Cohen, L. R. 7 Q. B. 527; Cole *v.* Kernot, L. R. 7 Q. B. 534 note.

person for whose benefit it is exercised.[1] This point is of no importance in the United States because the title of the assignees does not relate back to such an act.

§ 393. **Authority of Agent and Partner.** — It was said by a learned judge that the bankruptcy of an agent revokes his authority, and this *dictum* is repeated by text writers;[2] but it is not sound as applied to ordinary agencies. Revocation in bankruptcy depends upon the change of title, and the trustees of an agent have no title to the property of the principal. The practical application of this *dictum*, if it were sound, would be that a third person knowingly dealing with a bankrupt agent would not be protected; but no such decision can be found. On the contrary it has been repeatedly decided that a bankrupt acting as trustee or agent may maintain actions notwithstanding his bankruptcy.[3] The principal, no doubt, will expressly revoke, if he finds occasion. If one has been entrusted with the note of another as an accommodation, he may endorse it after his bankruptcy.[4]

The agency of a partner to act for the firm may be said to be revoked by the bankruptcy and assignment;[5] but the true way of stating this is that the partnership being dissolved, the agency which is an incident falls with it.

§ 394. **Submission to Arbitration.** — A submission to arbitration in the country does not bind the trustees under a subsequent decree, and therefore ceases to be mutual, and the other party may revoke, without liability on his covenants.[6] If however the trustees have appeared before the arbitrators, and the case has then proceeded beyond the time for revoking, both parties will be bound.[7]

An arbitration by rule of court cannot be revoked by the trustees. Money paid into court by the defendant to abide an award is subject to a lien and does not become general assets,

[1] Elliott *v.* Turquand, 7 App. Cas. 79.

[2] Per *Holroyd, J.*, Hudson *v.* Granger, 5 B. & Ald. 27; Story, Agency, 9th ed. § 486; Evans, Prin. & Agt. 92.

[3] *Supra*, § 369.

[4] See Wallace *v.* Hardacre, 1 Camp. 45; Arden *v.* Watkins, 3 East, 317; Sparhawk *v.* Broome, 6 Binney, 256; Willis *v.* Freeman, 12 East, 656.

[5] Craven *v.* Edmondson, 6 Bing. 734.

[6] Marsh *v.* Wood, 9 B. & C. 659.

[7] Dod *v.* Herring, 1 Russ. & M. 153.

unless it comes within the cause for dissolving attachments.[1] If an award and judgment for the defendant for costs were made after the bankruptcy, and the assignees had not intervened, the costs were formerly not a provable debt and the bankrupt was personally bound to pay them.[2]

§ 395. **General Summary of the Assignee's Title.** — 1. The assignees take every valuable property or interest, vested or contingent, legal or equitable, which the bankrupt held, or was entitled to, for his own benefit, at the date of the petition in bankruptcy.

2. In addition to this they take, as representing the general creditors, whatever creditors by judgment or otherwise could have recovered of third persons at law or in equity, because held for the bankrupt on a secret trust or conveyed by him in actual or constructive fraud of their rights.

3. They may upset conveyances or payments in fraud of the bankrupt law itself, such as preferences.

4. They do not take, even at law, property in which the bankrupt had a legal but not a beneficial interest; nor those personal rights which by the general policy of the law are not assignable even in equity, such as actions for libel or assault; nor what the statute expressly exempts for the benefit of the debtor and his family.

5. They are not bound to accept property which may involve them or the estate in loss, such as leaseholds and shares in companies subject to assessments.

[1] Taylor *v.* Shuttleworth, 6 Bing. N. C. 277; Ex parte Michie, 1 M. D. & De G. 181; Tayler *v.* Marling, 2 M. & G. 55; Ex parte Banner, L. R. 9 Ch. 379.

[2] Andrews *v.* Palmer, 4 B. & Ald. 250; Haswell *v.* Thorogood, 7 B. & C. 705.

CHAPTER XIII.

SECURED CREDITORS.

§ 396. **Valuing Security.** — We have already seen that the bankrupt's estate vested in the assignees is subject to all liens, charges, and incumbrances honestly and lawfully established by contract, and to judicial liens by attachment and seizure if they have existed for a certain time before the bankruptcy.[1]

The discharge of the bankrupt, of course, does not affect these securities, and they may be made the subject of a judgment or decree *in rem*,[2] but the creditor applying for such a remedy may be required to await the result of the bankrupt's discharge, if the bankrupt or the assignee insists upon it.[3]

If it is more convenient for the parties the court will permit action to be taken or to be carried on in the court of admiralty or in the State courts to ascertain the validity and amount of a maritime or a mechanic's lien; or if the case is a simple one it may try it in the bankruptcy. In Clifton *v.* Foster, 103 Mass. 233, Gray, J., said, in speaking of a mechanic's lien, that if the courts of the United States should abstain from providing for it, as they were at liberty to do, there would be no remedy excepting only by the proceedings provided in the State courts.

§ 397. **Secured Creditor need not apply to Court of Bankruptcy.** — A creditor who is secured in any of the modes above mentioned is not bound to apply to the court of bankruptcy, unless he wishes to avail himself of some of the peculiar remedies given by that court. Thus, if he has an attachment or other lien which is preserved, he may have a special judg-

[1] See *supra*, §§ 308, 332.

[2] Moody *v.* Webster, 3 Pick. 424.

[3] Ray *v.* Wight, 119 Mass. 426; Towne *v.* Rice, 122 Mass. 67.

ment entered *in rem*;[1] if he has a mortgage or pledge with power of sale, he may sell after breach of condition, or foreclose.[2] This must be understood, however, as subject to the reserved power of the court of bankruptcy presently to be mentioned. Our meaning here is, that the remedies of a secured creditor are not affected unless and until there is positive action in the court of bankruptcy. It was the practice in some districts, while the law of 1867 was in force, to require all secured creditors to make formal proof of their debts, and to obtain the permission of the District Court before exercising a power of sale. A very learned judge established this practice in a judgment of much ability.[3] His reasoning was based upon a form adopted by the Supreme Court for proving a debt "with security," from which it was inferred that all secured creditors must prove their debts. There was nothing in the statute which required this practice, nor was it of any use excepting to those who made fees by it; and, in fact, the form was borrowed from the English law in which "security" meant only bills or notes, which are security in a certain sense, but in another are evidences of the same debt. The practice was not general, and it was afterwards decided that a secured creditor who did not care to prove any part of his debt, might prosecute his usual remedies as if the debtor were not bankrupt, unless the court of bankruptcy should affirmatively forbid such action.[4] This power was expressly reserved to secured creditors by the English statute of 1869, which, however, was only declaratory in this particular.[5] No mention is made

[1] Peck *v.* Jenness, 16 N. H. 516; 7 How. 612; Davenport *v.* Tilton, 10 Met. 320; Bowditch Mut. Ins. Co. *v.* Jackson, 12 Gray, 114; Bates *v.* Tappan, 99 Mass. 376; Bosworth *v.* Pomeroy, 112 Mass. 293; Stockwell *v.* Silloway, 113 Mass. 382; Johnson *v.* Collins, 116 Mass. 392; Reed *v.* Bullington, 49 Miss. 223.

[2] Jerome *v.* McCarter, 94 U. S. 734; Hall *v.* Bliss, 118 Mass. 554.

[3] Davis *v.* Anderson, 6 N. B. R. 145, Fed. Cas. No. 3623.

[4] Norton *v.* Boyd, 3 How. 426; Sutherland *v.* Lake Sup. Co., 9 N. B. R. 298, Fed. Cas. No. 13,643; s. c. *nom.* Jerome *v.* McCarter, 94 U. S. 734; Yeatman *v.* Savings Inst., 95 U. S. 764; Jones *v.* Lellyett, 39 Ga. 64; Cumming *v.* Clegg, 14 N. B. R. 49; Stoddard *v.* Locke, 43 Vt. 574; Second Nat. Bank *v.* Nat. State Bank, 10 Bush, 367; Talbert *v.* Melton, 9 Sm. & M. 9.

[5] Tucker *v.* Wilson, 1 P. Wms. 261; Ex parte Reid, 1 Dea. & Ch. 250; Ex parte Belcher, 2 Dea. & Ch. 587; Ex parte Rolfe, 3 Mont. & A. 305; Ex parte

of the subject in the English statute of 1883 now in force.

§ 398. **Secured Creditor may apply for a Sale.** — All debts being considered as due and payable at the date of the bankruptcy for the purposes of proof, and a secured creditor having, as we shall presently see, the right to prove for such part of his debt as is not protected by the property in his hands, he may apply to the court of bankruptcy for a sale, though his debt is not yet payable, and though there has been no breach of the agreement or condition.[1]

So though he have a mere lien or charge with no right to sell, he may obtain that right by application to the court.[2] A great many cases of the sort are reported in the English books, because a common form of security there was by a simple deposit of deeds without writing, which gave the holder an equitable lien but no power of sale. So where there is only a common law lien without power of sale, or where an unpaid vendor has retained possession of goods, or has stopped goods *in transitu*.[3]

§ 399. **Court may regulate the Liquidation of Securities.** — The court of bankruptcy has power to regulate the whole administration of the estate, including the ascertainment and liquidation of all incumbrances.[4] Therefore, while the secured creditor may lawfully proceed, unless restrained, the courts, at the suggestion of the assignees, will await the action of the court of bankruptcy.[5] So, it is the practice to stay a sale under a power, during the interval between the filing of the petition and the appointment of the assignees, upon the application either of the debtor or of any creditor,[6] unless the state of the

Geller, 2 Mad. 262; Re Elmslie, L. R. 9 Eq. 72; White *v.* Simmons, L. R. 6 Ch. 555.

[1] Ex parte Bignold, 3 Dea. 151; Ex parte Moore, 2 Dea. & Ch. 7; Ex parte Bacon, ib. 181.

[2] Robson (7th ed.), pp. 339 *et seq.*

[3] Snee *v.* Prescot, 1 Atk. 245, 251; Patten's Appeal, 45 Penn. St. 151; Mass. Iron Co. *v.* Hooper, 7 Cush. 183; Ex parte Moffatt, 1 M. D. & De G. 282; s. c. 2 M. D. & De G. 170; Ex parte Twining, 1 M. D. & De G. 691; Ex parte Lewis, 3 M. D. & De G. 173.

[4] Ex parte Christy, 3 How. 292.

[5] Clifton *v.* Foster, 103 Mass. 233; Munson *v.* Boston, H., & E. R. R. Co., 120 Mass. 81.

[6] Re Grinnell, 7 Ben. 42, Fed. Cas. No. 5830.

property or of the market, or some other circumstance, makes an immediate sale important, in which case a stay will not be granted except upon terms which will indemnify the secured creditor against loss by the delay. This practice binds the conscience of the court at whatever stage of the proceedings a secured creditor is to be delayed.

§ 400. **Rights of Assignees.** — After the assignees are appointed, they may examine summarily the secured creditor, as they may other persons interested in the estate, in order to ascertain the amount, nature, and validity of the debt and security.[1] They have all the right of the debtor to redeem or to sell the equity; and, under some statutes, they have a right correlative to that of the creditor to redeem before the debt is due.[2] They are the proper parties to all suits for foreclosure, instead of the bankrupt. They may apply to the court of bankruptcy to exercise the powers mentioned in the following section.[3]

§ 401. **Sales by order of Court free of Incumbrances.** — Under the broad powers given to the courts by the bankrupt acts of the United States, they can order incumbered property to be sold free of all liens and charges, and require the several incumbrancers to look to the fund derived from the proceeds of sale.[4] This was first established in a case in Louisiana, and accords with the practice in France, where the syndics sell the whole assets and rank the various lien creditors. This power should not be exercised against the protest of the secured creditors, unless there is reasonable ground for believing that the bankrupt's equity will prove to be valuable.[5] The assignees ought not to speculate upon the property of a mortgagee; nor is it their duty or right to settle the conflicting claims of different incumbrancers among themselves at the expense of the

[1] Ex parte Caldecott, Mont. 55. See *supra*, § 148.

[2] Archbold's Bankruptcy Practice (11th ed.), p. 237.

[3] Houston *v.* City Bank, 6 How. 486; Foster *v.* Ames, 1 Lowell, 313, Fed. Cas. No. 4965.

[4] Ex parte Christy, 3 How. 292; Wilson *v.* Turpin, 5 Gill, 56; Re Mead, 58 Fed. Rep. 312; Burt *v.* Batavia Co., 86 Ill. 66. [The sale discharges liens placed on the property by the insolvent, but not prior liens. Daniel *v.* Creditors, 23 So. Rep. 241 (La.).]

[5] Re Taliafero, 3 Hughes, 422, Fed. Cas. No. 13,736.

bankrupt's estate. The mode of ascertaining a deficiency to be proved by the later incumbrancers is to sell the equity, relieved of the debts of such persons, and thereby establish what, if anything, is to be credited by them. Where there is but one incumbrance, and no fair prospect of a surplus, the creditor should be permitted to foreclose and wait the future chances of the market, if he prefers that remedy.

In England and some of the States such a sale can only be ordered when the secured creditor asks for it.[1]

§ 402. **All Persons whose liens are affected must be made Parties.** — In no case can a sale by order of court free the property from the liens of persons not before the court. And where a *bona fide* purchaser from the assignees is met with such an incumbrance of which he was not informed, his title must yield, because both being innocent, the elder title is the better.[2] This rule, though just, hardly seems to be necessary any more than in admiralty and other proceedings *in rem*. Justice only requires such publicity that all persons interested must have notice.

It is, of course, unnecessary to notify earlier incumbrancers, when only the equity of redemption is sold, as all their rights are reserved. Therefore, a second mortgagee need not, in such case, summon in the first; but the first must summon the second; and so of all others.[3]

§ 403. **Different Rules in Equity and in Bankruptcy concerning Proof by secured Creditor.** — By the general law of equity, a secured creditor might pursue all his remedies, and was, therefore, entitled to prove in full, and retain his security at the same time. This rule was applied in the settlement of the insolvent estates of deceased persons, and in the winding up of insolvent corporations.[4] In bankruptcy, the practice has al-

[1] Day *v.* Lamb, 6 Gray, 523; Wickenden *v.* Rayson, 6 De G. M. & G. 210; and see Ex parte Jackson, 5 Ves. 357; Hunnewell *v.* Goodrich, 3 Cush. 469; Ex parte Topham, 1 Mad. 38; Ex parte Lacon, 1 Bky. & Ins. R. 107.

[2] Ray *v.* Norseworthy, 23 Wall. 128; Moorman *v.* Arthur, 90 Va. 455.

[3] Day *v.* Lamb, 6 Gray, 523; Jerome *v.* McCarter, 94 U. S. 734.

[4] Rome *v.* Young, 3 Y. & C. (Ex) 199; 4 Y. & C. 204; Tipping *v.* Power, 1 Hare, 405; King *v.* Smith, 2 Hare, 239; Mason *v.* Bogg, 2 Myl. & Cr. 443; Kellock's Case, L. R. 3 Ch. 769; Atty. Gen. *v.* Cox, 3 H. of L. 240. See Merrill *v.*

ways been to require a creditor not fully secured to realise his security, and prove only for what remains of his debt above the value of the security.[1]

The singular part of this diversity of practice is that both rules were adopted by courts of equity in cases really analogous.

§ 404. **The Rule in Bankruptcy is now more generally adopted.** — The courts of this country approached this subject from the equitable side, because they had no general bankrupt laws, and some of them adopted the rule in bankruptcy,[2] and others the general rule of courts of equity.[3] Judge Story, in administering the bankrupt law of 1841, unhesitatingly adopted the practice in bankruptcy.[4] This practice deprives the secured creditor whose security is not equal to his debt of a part of what the

Nat. Bank of Jacksonville, 173 U. S. 131, where the rule was applied in winding up an insolvent national bank.

[1] Ex parte Wardell, Cooke, 8th ed., 206; Snee *v.* Prescot, 1 Atk. 245, 251; Ex parte Twining, 1 M. D. & De G. 691; Ex parte Sheppard, 2 M. D. & De G. 431; Ex parte Cooper, 3 M. D. & De G. 717; Ex parte Manchester, etc. Banking Co., L. R. 18 Eq. 249; Ex parte Spyer, 1 De G. J. & S. 318; Re Savin, L. R. 7 Ch. 760; Ex parte King, L. R. 20 Eq. 273. See dissenting opinion of Gray, J., in Merrill *v.* Nat. Bank of Jacksonville, *supra*. [A creditor cannot add interest after the date of the receiving order to his debt and apply his security to that. Re Bonacino, 1 Manson, 59.]

[2] Amory *v.* Francis, 16 Mass. 308; Dickson *v.* Chorn, 6 Iowa, 19; Knowles, Petitioner, 13 R. I. 90; Wurtz *v.* Hart, 13 Iowa, 515; Farnum *v.* Boutelle, 13 Met. 159; Int. Trust Co. *v.* Marble Co., 63 Vt. 326; Pattberg *v.* Pattberg, 55 N. J. Eq. 604; Swedish Bank *v.* Davis, 64 Minn. 250; Wheat *v.* Dingle, 32 S. C. 473; Third Nat. Bank *v.* Lanahan, 66 Md. 461; Union Bank *v.* Mechanics' Bank, 80 Md. 371; In re Frasch, 5 Wash. 344; In re Harvey (Cal.), 32 Pac. 567; State *v.* Bank (Neb.), 58 N. W. 976.

[3] See a learned opinion in Jervis *v.* Smith, 7 Abb. Pr. N. S. 217; Keim's Appeal, 27 Penn. St. 42; Miller's Appeal, 35 Penn. St. 481; Patten's Appeal, 45 Penn. St. 151; Moses *v.* Ranlet, 2 N. H. 488; Findlay *v.* Hosmer, 2 Conn. 350; Logan *v.* Anderson, 18 B. Mon. 114; Allen *v.* Danielson, 15 R. I. 480, overruling Knowles, Petitioner, 13 R. I. 90; People *v.* Remington, 121 N. Y. 328; Re Ives, 25 Abb. N. C. 63; Third Nat. Bank *v.* Haug, 82 Mich. 607; Matthews *v.* Trust Co., 52 Fed. Rep. 687; Kellogg *v.* Miller, 22 Ore. 406; Brown *v.* Merchants' Bank, 79 N. C. 244; Furness *v.* Union Bank, 147 Ill. 570; Citizens' Bank *v.* Patterson, 78 Ky. 291 (this was a voluntary assignment; the law as to insolvency is different; Spratt *v.* First Nat. Bank, 84 Ky. 85); Lloyd *v.* Western Bank, 30 Weekly Law Bull. 165; First Nat. Bank *v.* Comm. Bank, 151 Ill. 308; Furness *v.* Union Bank, 46 Ill. App. 522; N. Y. Security & Trust Co. *v.* Lombard Co., 73 Fed. Rep. 537; Wheeler *v.* Walton, 72 Fed. Rep. 966; Merrill *v.* Nat. Bank of Jacksonville, 173 U. S. 131.

[4] Re Babcock, 3 Story, 393, Fed. Cas. 696; Re Grant, 5 Law Reporter, 303, Fed. Cas. No. 5690.

debtor had given him. It is, however, as I have said, a very ancient practice in bankruptcy, that a creditor, as a learned judge has expressed it, shall not have the whole of a part, and, at the same time, a part of the whole. It is the law of France; it has now been adopted by statute in England for all cases;[1] and in many of the States of the Union in administrations of the estates of deceased persons; and is to be considered the prevailing doctrine at the present time. No statute, so far as I know, has ever enacted the old rule of equity, though many have repealed it.

§ 405. **Law of 1867.** — The Statute of 1867, § 20 (14 Stats. 527), following the practice established by the courts of bankruptcy, declared that a creditor who had a mortgage, pledge, or lien, upon the property of the bankrupt, for securing the payment of a debt owing to him from the bankrupt, should be admitted as a creditor only for the balance of his debt after deducting the value of his security, to be ascertained by agreement between him and the assignees, or by a sale to be made as the court should direct; or he might release his claim to the property and prove his whole debt. If the property was not so sold, released or delivered up the creditor should prove no part of his debt.

Under the statute of 1867, if a sale of security had been made in good faith before the appointment of the assignees, in pursuance of a power given by the contract, or afterwards with the consent of the assignees, a literal compliance with the statute by applying to the court beforehand was not considered essential, but several of the courts held that they could confirm the sale *nunc pro tunc*.[2]

In Massachusetts the security held by a creditor of a deceased insolvent may be valued by agreement with the ad-

[1] Judicature Act, 1875, § 10; Re Coal Consumers' Assn., 4 Ch. D. 625, per *Malins, V. C.;* Re Knott, 7 Ch. D. 549, note.

[2] Lee *v.* Franklin Inst. Sav. 3 N. B. R. 218, Fed. Cas. No. 8188; Re Moller, 8 Ben. 526, Fed. Cas. No. 9699, affirmed 14 Blatch. 207, Fed. Cas. No. 9700; Bradley *v.* Adams Exp. Co., 3 Fed. Rep. 895. See Re Grinnell, 7 Ben. 42, Fed. Cas. No. 5830; and see Re Grinnel, 9 N. B. R. 137, Fed. Cas. No. 5829; Re Herrick, 17 N. B. R. 335, Fed. Cas. No. 6421; Re Miller, 19 N. B. R. 78, Fed. Cas. No. 9555; Haverhill Loan Assn. *v.* Cronin, 4 Allen, 141.

ministrator, and in case of living insolvents by agreement with the assignee,[1] but in the latter case a sale must be ordered by the court and the consent of the assignee is not enough; but where the creditor offered to rescind the sale if the court of bankruptcy should require it and resell under its orders, the requirements of the statute were held to have been satisfied.[2] Where a second mortgagee had received part payment from the surplus proceeds of a sale made under the first mortgage, he could prove.[3]

§ 406. **Policy on Life.** — Though a policy upon the bankrupt's life for security of his debt is not a mortgage, pledge, or lien upon his property, it must be credited, if it was paid for by the bankrupt, or if it was obtained under a contract by which the creditor was a trustee for him,[4] for the statute is declaratory and does not exclude or supersede the practice of the courts. It is to be credited, however, only at its cash surrender value, and if it have none, the creditor proves in full.[5]

It has been twice decided that if the bankrupt die pending the proceedings, the assignees are not bound to pay dividends on the amount proved, but that the proof may be so reformed that the creditor shall receive only full indemnity out of the insurance money and the dividends together.[6]

§ 407. **Only the Bankrupt's Property is to be credited.** — The property which must be credited is only that which, if surrendered, would increase the assets against which the proof is offered; because the practice is only excused by a benefit to the general body of creditors.[7] This reason is so obvious that the French code, which speaks in very general terms of all

[1] Smith *v.* Warner, 133 Mass. 71.

[2] Wilson *v.* Bryant, 134 Mass. 291.

[3] Washburn *v.* Tisdale, 143 Mass. 376.

[4] Ex parte Newland, 6 Ben. 342, Fed. Cas. No. 10,170; Ex parte Andrews, 2 Rose, 410, 1 Mad. 573.

[5] Ex parte Newland, 6 Ben. 342, Fed. Cas. No. 10,170.

[6] Ex parte Newland, 7 Ben. 63, Fed. Cas. No. 10,171; Re Miller, 6 Ch. D. 790.

[7] See Re Potts (1893), 1 Q. B. 648; Re Blackburne, 9 Morrell, 249; Re Hallett (1894), 2 Q. B. 256; Re Sass (1896), 2 Q. B. 12; Rolfe *v.* Flower, L. R. 1 P. C. 27; Brocklehurst *v.* Lawe, 7 E. & B. 175; Re Anderson, 12 N. B. R. 502, Fed. Cas. No. 350; Re Dunkerson, 12 N. B. R. 413, Fed. Cas. No. 4157; and see the three following sections.

secured creditors, is so interpreted by the best writers: Alauzet, No. 2662. If the debtor, after incumbering his property has parted with the equity, the court cannot order a sale or surrender, and the assignees have no right to require a credit.[1] Such a case does not come within the statute.[1]

In the converse case of a bankrupt who had bought an equity and promised the vendor to pay the mortgage, it was held in England that the Court had no authority to deal with the case, although the vendor joined in the petition.[2] In this country, many courts of law, and all courts of equity, give a mortgagee a right of proceeding against the new promisor for a deficiency, so that here a proof would be admissible for such deficiency; at least if both mortgagor and mortgagee petitioned. When the rule was adopted by the courts and no statute affected the question, the mortgagee was required to realize his security, though the equity had been conveyed to the daughter of the mortgagor, the equitable rights of these parties not being proved.[3]

§ 408. **Property of Wife, and of Husband,** *jure mariti.* — If the bankrupt's debt is secured upon the separate property of his wife, the creditor proves in full.[4] If upon her real estate in which he has a life interest, as tenant by the curtesy initiate, or otherwise, the value of his interest is deducted.[5] Where, in such a case, the wife had obtained a decree that she should redeem the property, her husband's assignees having disclaimed, and, thereupon, the mortgagee offered to prove for the whole of his debt, the court of appeal held that he might do so in the first instance, with directions that if the wife failed to redeem, then the life interest of the bankrupt, disclaimed for a different purpose, would revive, and must be deducted, and they left open the question whether, if the

[1] Bassett *v.* Baird, 85 Penn. St. 384; Dickson *v.* Chorn, 6 Iowa, 19; Glendon Co. *v.* Townsend, 120 Mass. 346; Re Kinne, 5 Fed. Rep. 59; Wilson *v.* Bryant, 134 Mass. 291.

[2] Ex parte Keightley, 3 De G. & Sm. 583.

[3] Bristol County Bank *v.* Woodward, 137 Mass. 412.

[4] Ex parte Hedderly, 2 M. D. & De G. 487; Savage *v.* Winchester, 15 Gray, 453.

[5] Re Sauthoff, 14 N. B. R. 364, Fed. Cas. No. 12,379; Ex parte Paine, 3 De G. J. & S. 458.

wife redeemed, she could hold the full proof made by the mortgagee.[1]

§ 409. **Exempted Property.** — It was held by a late able judge, that if the bankrupt has given a mortgage upon property which is expressly exempted from the decree, such as a homestead, the general creditors have an equity to require him to apply his security before proving. This decision contravenes the general rule, and its soundness is doubted.[2]

§ 410. **Property of third Persons.** — Under this rule, property pledged or incumbered by a surety for his principal,[3] by a stockholder for the corporation,[4] by a partner for his copartner, or by any or all the partners for the firm, or *vice versa*, though the firm is bankrupt,[5] and by any one but the bankrupt, are not to be accounted for in making proof against the estates which did not furnish the security.[5]

The court looks at the actual interest, and if property equitably joint, though legally not so, is pledged for a joint debt, or property which, for equitable reasons ought to go to diminish the debt, it must be deducted, and, *per contra*, property of no beneficial value need not be.[6]

When joint debtors, not partners, gave security on land which they held in common, and one debtor became bankrupt, the whole value of the security was required to be deducted before proof was made against his assets;[7] which is perhaps defen-

[1] Ex parte Paine, 3 De G. J. & S. 458.

[2] Re Santhoff, 14 N. B. R. 364, Fed. Cas. No. 12,379. But see Re Stillwell, 7 N. B. R. 226, Fed. Cas. No. 13,448; Dickson *v.* Chorn, 6 Iowa, 19; Ex parte Goodman, 3 Mad. 373.

[3] Ex parte Parr, 1 Rose, 76; Ex parte Goodman, 3 Mad. 373; Ex parte Turney, 3 M. D. & De G. 576; Richardson *v.* City Bank, 11 Gray, 261.

[4] Cabot Bank *v.* Bodman, 11 Gray, 134; Fox *v.* Eckstein, 4 N. B. R. 373, Fed. Cas. No. 5009.

[5] Brickwood *v.* Miller, 3 Mer. 279; Ex parte Rodgers, 1 Dea. & Ch. 38; Ex parte Bowden, ib. 135; Ex parte Biddulph, 3 De G. & Sm. 587; Re Holbrook, 2 Lowell, 259, Fed. Cas. No. 6588; Re Thomas, 17 N. B. R. 54, Fed. Cas. No. 13,886; Re Chaffey, 30 U. C. Q. B. 64. But see, as to a change by statute in Canada, Clarke, Insolvent Acts, 255; Ex parte Bate, 3 Dea. 358; Ex parte Shepherd, 1 M. D. & De G. 101, affirmed 2 M. D. & De G. 204.

[6] Ex parte Connell, 3 Dea. 201; Ex parte Turney, 3 M. D. & De G. 576; Ex parte Manchester Bank, 3 Ch. D. 481; Ex parte McKenna, 30 L. J. (Bkcy.) 25; Brett's Case, L. R. 8 Ch. 800.

[7] Richardson *v.* Wyman, 4 Gray, 553, explained in Cabot Bank *v.* Bodman, 11 Gray, 134, doubted in Wilson *v.* Bryant, 134 Mass. 291. *Contra*, Ex parte West Riding Union Banking Co., 19 Ch. D. 105.

sible, on the ground that the debt being joint, and not joint and several, if the creditor claimed to prove his whole debt, he should perhaps give credit for the whole security. Unless the decision can be thus explained, it is not sound. The rule is clear that only the interest of the bankrupt is to be valued. Thus where the bankrupts accepted a bill, and the creditor had a lien on goods in which they were jointly interested with a third person, their interest only was deducted.[1] And so where a firm had been dissolved and the continuing partner became bankrupt, all his debts being several, creditors secured by joint property of the former partners were required to give credit for that half of the property which belonged to their debtor.[2] If the creditor has separate promises, as upon a note or bill drawn or signed by one and accepted or indorsed by the other partner, he may prove in full against each separate estate, though he have security upon the joint property.[3]

§ 411. **Security for Composition.** — Where a creditor had accepted a composition, payable by instalments, with security, the original debt to revive on failure to pay any instalment, and the debtor became bankrupt, not having paid the whole composition, it was decided that the creditor might elect to hold his security as against the lesser debt represented by the balance due on the composition, or to give up his security and prove for the original debt, deducting only the instalments received, but that he could not retain the security as against the larger amount.[4]

§ 412. **Security by Bills and Notes.** — Bills and notes of the debtor himself, taken for goods sold, or money lent, are often securities, and this circumstance has caused a misunderstanding of some of the English cases, as before explained. They are not securities upon property, and are only brought into court in testimony of their not having been negotiated. Being considered as security for the debt, it is the practice in England to prove the debt, exhibiting the "securities," for the

[1] Ex parte Prescott, 3 Dea. & Ch. 218, and 4 Dea. & Ch. 23.

[2] Ex parte West Riding Union Banking Co., 19 Ch. D. 105.

[3] Re Plummer, 1 Phil. 56; Ex parte English & Am. Bank, L. R. 4 Ch. 49.

[4] Ex parte Ellis, 4 Dea. & Ch. 736.

purpose above mentioned. In this country, it is usual to prove on the bills and notes themselves.[1] The result is altogether similar, because in both countries when a dividend is paid it is indorsed on the securities, and when a bill or note has been paid in full by an acceptor or promisor, the estate of a bankrupt surety or indorser is relieved by striking out so much of the proof.[2]

It has been held that bills and notes of third persons which are merely pledged or deposited for a debt and not indorsed or indorsed without recourse must be sold or valued;[3] but not if they have been discounted, nor if money has been advanced upon them preparatory to an expected discount, nor if given as security for goods sold.[3] Again, if they have been indorsed by the bankrupt without restriction, a sale of them would render his estate liable on the indorsements, as well as for any deficiency of the original debt, which, if the other parties are insolvent, would defeat the purpose of the rule, which is to relieve his general assets. For this reason, and because such a transfer of paper is not a mere pledge of property, but includes a promise on the bankrupt's part, the better opinion is that the creditor in such a case may prove upon the bankrupt's indorsement of the bills or notes to the extent of the debt due from him to the creditor, without a sale or valuation unless it is clear that the indorsement was merely for collection.[4] We have already seen that the creditor may prove against the estates of third persons the full amount of the several bills or notes.[5]

§ 413. **Surety; Law of Massachusetts and Maine.** — Another exception is permitted in Massachusetts and Maine, that if security is given by the principal direct to the creditor, the latter must apply it before proving against the estate of

[1] See *supra*, § 224.

[2] See *supra*, § 168.

[3] See Ex parte Britten, 3 Dea. & Ch. 35; Ex parte Early, 14 L. T. N. S. 296; Ex parte Price, 3 M. D. & De G. 586.

[4] Ex parte Farnsworth, 1 Lowell, 497, Fed. Cas. No. 4672; Re Weeks, 13 N. B. R. 263, Fed. Cas. No. 17,349; Ex parte Wildman, 1 Atk. 109; Ex parte Bloxham, 6 Ves. 449; Ex parte Twogood, 19 Ves. 229; Ex parte Vere, 4 Dea. & Ch. 295; Ex parte Philipps, 1 M. D. & De G. 232; Ex parte Schofield, 12 Ch. D. 337; Ex parte Gloucestershire Bank Co., 5 L. T. N. S. 216.

[5] Ex parte Blackburne, 10 Ves. 204; Ex parte Rathbone, Buck, 215.

the bankrupt surety;[1] the soundness of the decision has been denied,[2] and it is not the law of England.[3] There are circumstances in which a surety has a right to have the securities of the creditor applied before he is called on,[4] but it is submitted that, except in those cases, the assignees of the surety have no equity to reduce his just debt by the application of any property not his own. In adjusting the accounts between the two estates after the creditor is paid in full, that of the surety will of course be entitled to the benefit of the securities in account.

§ 414. **Security held by Surety.** — If, however, security is given by the principal to the surety for his indemnity, and both become bankrupt, the creditor can prove against neither estate without first crediting the security.[5] This is hardly an exception to the general rule, for both estates are interested in the security; that of the principal because it was his property, and is pledged for his debt; and that of the surety because it was given specifically for his indemnity, and he has not only an equity but a special property in it, and his general creditors have a right to see it appropriated, as far as it will go, to the purpose for which it was pledged. In Scotland proof is made in full against both estates and the security is applied to reimburse the surety's estate the amount of dividends paid on the debt.[6]

If the surety who holds security from the bankrupt principal for his indemnity remains solvent, the creditor can prove in full against the assets of the principal. The equity is precisely the same as in the case last considered, that the principal's property ought to be applied towards the payment of his

[1] Lanckton *v.* Wolcott, 6 Met. 305, as explained in Cabot Bank *v.* Bodman, 11 Gray, 134, followed, Re Fickett, 72 Maine, 266, and Wilson *v.* Bryant, 134 Mass. 291.

[2] Re Cram, 1 N. B. R. 504, Fed. Cas. No. 3343.

[3] Ex parte Fairlie, 3 Dea. & Ch. 285. See Re Hodges, 3 Manson, 329.

[4] 1 Brandt, Suretyship, 2d ed. § 237; Baylies, Sureties, p. 305.

[5] Ex parte Waring, 19 Ves. 345, see the decree in Powles *v.* Hargreaves, 3 De G. M. & G. 430; Ex parte Hobhouse, 2 Dea. 291; Coupland's Claim, L. R. 5 Ch. 167; Leech's Claim, L. R. 6 Ch. 388; Ex parte Brett, ib. 838; Banner *v.* Johnston, L. R. 5 H. of L. 157; Ex parte Joint Stock Dis. Co., L. R. 19 Eq. 1, and L. R. 10 Ch. 198.

[6] Royal Bank *v.* Commercial Bank, 7 App. Cas. 366.

own debt, unless there is some hardship to the proving creditor. In this country the courts recognize a distinct and positive trust on the part of the surety to apply the property to the debt.[1] The practice, therefore, should be to require this application in the first instance. But the statutes have not provided for the case and the decisions are that the creditor may prove in full.[2] If the creditor has a contract which enables him to prove in full against the bankrupt, though he has a surety for part of his debt, it would be unjust to deprive him of his proof by reason of security held by the surety without his privity.[3]

Proof in full does not necessarily imply that full dividends are to be drawn. It was always the practice in doubtful or disputed cases, turning upon the title to property in the hands of the creditor, to permit proof by him in the bankruptcy, subject to revision afterwards when the title should have been litigated, because the commissioners formerly lacked power to decide questions of title, but had full power to adjust the amount of dividend to be paid to any creditor, and the proof was required to be made at certain stated meetings, or the right might be lost.[4] It may be, therefore, that a bill or petition would lie by the assignees for the application of the security and the reduction of the proof. Such is, perhaps, the law of bankruptcy.[5] If the surety pays the debt and offers to prove or to be subrogated to the creditor's proof, he must give credit for the security.[6]

At law a solvent surety holding security has no valid defence against the creditor by reason of the creditor having

[1] 2 Brandt, Suretyship, 2d ed. § 324.

[2] Franklin County Bank *v.* First N. Bank of Greenfield, 138 Mass. 515; Agawam Bk. *v.* Morris, 4 Cush. 99; Meed *v.* Nelson, 9 Gray, 55; Prov. Inst. *v.* Stetson, 12 Gray, 27; Ex parte Brathwaite, 36 L. T. N. S. 520, affirmed, 841; Ex parte Paramore, 1 Dea. 279; Re Barham, 1 M. D. & De G. 179.

[3] Midland Bk. *v.* Chambers, L. R. 7 Eq. 179, L. R. 4 Ch. 398.

[4] See Ex parte Ackroyd, 1 Gl. & J. 391; Ex parte Dobson, 4 Dea. & Ch. 69; Ex parte Rippon, L. R. 4 Ch. 639.

[5] See Re Jaycox, 8 N. B. R. 241, Fed. Cas. No. 7242; Re Holbrook, 2 Lowell, 259, Fed. Cas. No. 6588; Ex parte Sherrington, 1 M. D. & De G. 195; Ex parte Mann, 5 Ch. D. 367.

[6] Re Baldwin, 19 N. B. R. 52, Fed. Cas. No. 796; Ex parte Mann, 5 Ch. D. 367, 370, per *Mellish, L. J.*; Baines *v.* Wright, 15 Q. B. D. 102.

proved in full.[1] But the creditor by proving waives his right to look to the property.[2]

§ 415. **Valuation of Security; Agreement.** — The value to be credited may be fixed by agreement between the creditor and the assignees,[3] either directly or through such appraisement of disinterested persons as they may jointly appoint; and the creditor may pay any excess, or prove for any deficiency accordingly. And it may be said in general that, subject to the revisory power of the court, any disposition which the parties may make is equivalent to an order of court.[4] In Massachusetts a sale by consent of the assignee is not the equivalent of one ordered by the court.[5] In England the creditor has the right in order to prove at the first meeting or in composition to value his own security, but subject to the liability to account to the assignee or the compounding debtor, as the case may be, for any surplus which he may realize above the valuation, and with no right to prove for any deficiency.[6]

§ 416. **Equitable Practice.** — If the creditor, through no fault of his own, has lost his security he may prove in full at any time before the estate is finally settled.[7]

Courts of bankruptcy permit a secured creditor to sell part of his security and abandon the unsalable part;[8] to make claim for a debt secured by property, of which the title is claimed by a third person, and await the issue of the litigation before ascertaining the value;[9] and to prove for his full debt, retaining security which at the time is wholly unsalable, upon his undertaking to account for whatever may be realized from

[1] Merchants' Bank *v.* Comstock, 55 N. Y. 24.

[2] *Infra*, § 422, and see Re Morris, 2 Lowell, 424, Fed. Cas. No. 9823; New Bedford *v.* Fairhaven, 9 Allen, 175; Re Jaycox, 8 N. B. R. 241, Fed. Cas. No. 7242; Franklin County Bank *v.* First Nat. Bank of Greenfield, 138 Mass. 515, per *Field, J.*

[3] Melbourne Bank Co. *v.* Brougham, 4 App. Cas. 156.

[4] Ex parte Whitbread, 3 Dea. 311; Re Moller, 8 Ben. 526, Fed. Cas. No. 9699; affirmed, 14 Blatch. 207, Fed. Cas. No. 9700; Re Letchworth, 18 Fed. Rep. 822.

[5] Smith *v.* Warner, 133 Mass. 71.

[6] Société Générale de Paris *v.* Geen, 8 App. Cas. 606.

[7] Ex parte Peake L. R. 2 Ch. 453.

[8] Ex parte Davenport, 1 M. D. & De G. 313; Ex parte Wace, 2 M. D. & De G. 730; Ex parte Greaves, De G. 119; Rome *v.* Young, 4 Y. & C. Ex. 204.

[9] Ex parte Williams, 4 Dea. & Ch. 180.

it.[1] In short, the mode of realizing or dealing with the securities is adapted to the equities of each case.

§ 417. **Sales of Incumbered Property; Practice.** — The court has full power over sales, and may set them aside for any good cause, and even for inadequacy of price, though this power will be exercised with great caution, and so as not to injure a *bona fide* purchaser.[2] It has power too to confirm an irregular sale,[3] and will do so when good faith has been exercised and the sale is a fair one, whatever may have been the informality, as by a mortgagee bidding without leave, an imperfect notice, or any other matter of form.[4] If a mortgagee has once bid in the property under a power and afterwards applies for a sale, he must put up the property at his former bid.[5] The sale should be by public auction unless otherwise ordered. The assignee has the conduct of the sale, because he is bound to be impartial and is never permitted to bid,[6] while the mortgagee may always obtain such leave.[7] If the mortgagee buys, he must conform to the terms of sale as to deposit, etc., like any other purchaser.[8] If the assignee in bankruptcy is the mortgagee, the court will appoint some impartial person to make the sale, or require the assignee to resign, or fix a limit of price.[9] The assignees have no right to fix a minimum price unless they undertake to pay the debt.[10]

[1] Ex parte Turney, 3 M. D. & De G. 576.

[2] Re O'Fallon, 2 Dillon, 548, Fed. Cas. No. 10,445; Re Bousfield, 16 N. B. R. 481, Fed. Cas. No. 1702.

[3] Ex parte Tatham, 1 Mont. & A. 335; Ex parte Stephens, ib. 31; Ex parte Wilson, Mont. & Ch. 110; Ex parte Yorke, 3 M. D. & De G. 329; Ex parte Partington, 1 Rose, 367; Ex parte Columbine, 2 M. D & De G. 24.

[4] Ex parte Ashley, 3 Dea. & Ch. 510; Ex parte Pedder, ib. 622. Lee *v.* Franklin Bank, 3 N. B. R. 218, Fed. Cas. No. 8188.

[5] Ex parte Francis, 1 Dea. & Ch. 274.

[6] Ex parte Smith, 2 Dea. & Ch. 60; Ex parte McGregor, 4 De G. & Sm. 603; Ex parte Cuddon, 3 M. D. & De G. 302.

[7] Ex parte Hodgson, 1 Gl. & J. 12; Ex parte Bacon, 2 Dea. & Ch. 181; Ex parte Lees, ib. 360; Ex parte Cowdry, 2 Gl. & J. 272; Ex parte Greenwood, 1 Dea. & Ch. 542.

[8] Ex parte Tatham, 1 Mont. & A. 335; Ex parte Stephens, 2 ib. 31; Ex parte Wilson, Mont. & Ch. 110.

[9] Ex parte Cowdry, 2 Gl. & J. 272; Ex parte Rolfe, 1 Dea. & Ch. 77; Ex parte Young, De G. 146; Ex parte Greenwood, 1 Dea. & Ch. 542; Ex parte Lees, 2 Dea. & Ch. 360; Ex parte Perkes, 3 M. D. & De G. 385.

[10] Ex parte Barnard, 3 Dea. & Ch. 291; Ex parte Ellis, ib. 297.

§ 418. **Application of Proceeds; Costs.** — The proceeds of sale, if they exceed the debt, are first applied to pay the costs of the sale and of the proceedings to obtain it. If the sale has been asked for by the assignee in good faith, and upon probable cause, the costs of the sale itself and of the order for it are allowed out of the proceeds, though they prove insufficient to pay the debt, and this even where the mortgagee is the purchaser;[1] and where the sale is at his request, the costs will always come out of the proceeds;[2] but the court should not tax any general charges upon this fund.[3]

§ 419. **Interest on Secured Debt.** — If the security exceeds the debt, the creditor receives interest until the settlement with the assignees whether by redemption, sale or otherwise.[4] There are *dicta* that if the creditor applies to the court for relief, the practice is to stop interest at the date of the adjudication; but this is not the law, excepting as applied to the proof for a deficiency.[5] If there is such a deficiency, the interest account can only be made up to the date at which unsecured creditors make up their accounts; that is to say, the secured creditor shall not apply his security to interest accrued after the bankruptcy, and thus prove a balance made up in part of such interest.[6]

Interest may be allowed by the court even after the bankruptcy, and though there is a deficiency, if there is an especial equitable claim for it, as when delay has been caused by the assignees, or has benefited them at the expense of the secured creditor.[7] Under the law of France, which expressly declares

[1] Re Ellerhorst, 2 Sawy. 219, Fed. Cas. No. 4380; Re Hambright, 2 N. B. R. 498, Fed. Cas. No. 5973; Re Eldridge, 4 N. B. R. 498, Fed. Cas. No. 4330.

[2] Ex parte Brown, 1 Dea. & Ch. 34; Ex parte Say, ib. 32; Ex parte Berkeley, 2 Mont. & A. 54. See Re Dumont, 4 N. B. R. 17, Fed. Cas. No. 4127; see Furness *v.* Union Bank, 46 Ill. App. 522.

[3] Re Blue Ridge Co., 2 Hughes, 224, Fed. Cas. No. 1570.

[4] Anon., 7 Vin. Abr. 110; Ex parte Martin, 2 Rose, 87; Ashwell *v.* Staunton, 30 Beav. 52.

[5] Re Haake, 2 Sawy. 231, Fed. Cas. No. 5883; Re Newland, 9 N. B. R. 62, Fed. Cas. No. 10,171; Re Bartenbach, 11 N. B. R. 61, Fed. Cas. No. 1068.

[6] Ex parte Wardell, Cooke, 8th ed. 206; Ex parte Badger, 4 Ves. 165; Ex parte Ramsbottom, 4 Dea. & Ch. 198; Ex parte Penfold, 4 De G. & Sm. 282; Re Savin, L. R. 7 Ch. 760; Ex parte Bath, 22 Ch. D. 450.

[7] Ex parte Ramsbottom, 4 Dea. & Ch. 198; Ex parte Kensington, 1 Dea. 58, 2 M. & A. 300; Ex parte Penfold, 4 De G. & Sm. 282.

that secured creditors shall retain the benefit of the security, it has been much mooted whether they may apply the proceeds of sale to interest accrued after the bankruptcy. Several learned authors agree with our view, that the equality established between unsecured creditors requires that the date of the liquidation should be taken in ascertaining how far a creditor is unsecured. Others, not denying the weight of this position, maintain that the words of the law do not admit of this meaning. If it were true in fact, as perhaps it is in the practice of the French courts, that the secured creditors cannot have the property sold before a certain date later than that fixed for the proof by general creditors, there would a strong argument for permitting interest to be charged against the property to the later date. In our practice the only necessary delay is until the appointment of the assignees; and even that will not, as we have seen, be ordered in derogation of the essential rights of an incumbrancer, but only upon equitable terms, one of which should be that he shall not lose interest by the delay.

§ 420. **At what time a Secured Creditor may Prove.** — It was once held that a secured creditor could not waive his security until after the assignees are chosen, because the arrangements are to be made with them; and therefore could not vote in the choice of the assignees.[1] This is too literal a construction of the statute, and might work great injustice when a large creditor, with apparent security which he considers worthless, wishes to vote for the assignees; and is unnecessary, since the proof of itself waives the security; and the better opinion is that the surrender or cancellation, express or implied, will entitle the creditor to vote at the first meeting.[2] To prevent misunderstanding, the renunciation should be expressed in the proof.[3]

In England, the practice grew up of permitting a secured creditor to value his security at his own risk, and to vote at the first meeting upon the deficiency, and this has been adopted

[1] Ex parte Baker, 8 Law Reporter, 461.

[2] Re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10,754.

[3] Ex parte Clark, 1 M. D. & De G. 622.

by the latest statute.[1] If the valuation is too high, he cannot enlarge his proof, and if too low he must pay the difference to the assignee.[2] In this country, this practice is inconsistent with the law which requires the valuation to be made by agreement with the assignee, or by a sale if the assignee and the creditor cannot agree. There is, however, no reason why the valuation should not be made at the first meeting, if it can be done with no possible injury to the general creditors, as when the whole face value of bills or notes is credited.[3] But a sale before the assignees are appointed will not usually be granted, or, if undertaken, will be enjoined, unless when there is more danger of loss to the creditor than of gain to the estate by a short delay; and if the creditor has made a sale and bought in the property, his purchase will be avoidable by the assignees, and he will not be permitted to vote; and if he has sacrificed the property, he cannot prove at any time.

§ 421. **Marshalling Securities.** — The equitable rules for marshalling securities are adopted in bankruptcy, and the assignees representing the bankrupt are subject to all these equities; thus if a factor has pledged his own property and that of his principal for his own debt, the creditor must first exhaust the former.[4]

If all the security belonged to the bankrupt, the secured creditor has the first right, and may apply the funds within the limits of his title in the way most beneficial to himself; so, for instance, as to pay a debt which would not be provable in bankruptcy, or to pay that part of the debt on which there will be the smallest dividend, or a note, the indorsers of which are worthless.[5]

[1] Ex parte Nunn, 1 Rose, 322; Ex parte De Tasted, ib. 324; Ex parte Greenwood, Buck, 323; Ex parte Barclay, 1 Gl. & J. 272.

[2] See a very hard case of this kind: Ex parte King, L. R. 20 Eq. 273.

[3] Re Bolton, 2 Ben. 189, Fed. Cas. No. 1614.

[4] Re Westzinthus, 5 B. & Ad. 817; Broadbent v. Barlow, 3 De G. F. & J. 570; Heyman v. Dubois, L. R. 13 Eq. 158; Ex parte Stephenson, 1 De G. 586; Baldwin v. Belcher, 3 Drury & W. 173; Ex parte Alston, L. R. 4 Ch. 168.

[5] Ex parte Havard, Cooke, 8th ed. 147; Ex parte Hunter, 6 Ves. 94; Ex parte Glyn, 1 M. D. & De G. 25; Ex parte Dickin, L. R. 20 Eq. 767; Ex parte Johnson, 3 De G. M. & G. 218; Wilcox v. Fairhaven Bank, 7 Allen, 270; Re Peebles, 13 N. B. R. 149, Fed. Cas. No. 10,902.

The persons next to be regarded are those holding valid titles or equities subsequent to his, such as a second mortgagee of part of the property; or a principal whose agent has fraudulently pledged his property; a surety who has encumbered his own property; shareholders who are personally liable for debts of the company.[1]

If no rights of third persons are concerned, the marshalling may be so ordered as to favor the general creditors against the bankrupt himself or persons claiming under him.[2] After a mortgagee has exercised his election, the courts have refused subrogation to the general creditors.[3]

§ 422. **Waiver of Security by Proof.** — A secured creditor, by proving his debt in full in competition with the other creditors, without duly crediting his security in one of the modes above pointed out, waives his lien for the benefit of the assignees, who may thereupon recover the property for distribution or may sell it discharged of the incumbrance. This applies in cases of composition or liquidation as well as in bankruptcy.[4] Therefore, if the creditor insists that he has no security on property of the bankrupt, and the assignees insist that he has such security, the creditor may prove in full, leaving the assignees to recover the property if it is in the situation for which he contends.[5]

The waiver is for the benefit of the estate, and neither the

[1] Ex parte Vere, 4 Dea. & Ch. 295; Re Westzinthus, 5 B. & Ad. 817; Ex parte Alston, L. R. 4 Ch. 168; Ex parte Hartley, 1 Dea. 288; Broadbent *v.* Barlow, 3 De G. F. & J. 570; Re State Fire Insurance Co., 34 L. J. Ch. 436; Re Professional Life Ass. Co., L. R. 3 Eq. 668; Heyman *v.* Dubois, L. R. 13 Eq. 158.

[2] Foster *v.* Inglee, 13 N. B. R. 239, Fed. Cas. No. 4973; Re Sauthoff, 14 N. B. R. 364, Fed. Cas. No. 12,379.

[3] Re International Life Ass. Soc., 2 Ch. D. 476.

[4] Ex parte Grove, 1 Atk. 104; Ex parte Hornby, Buck, 351; Ex parte Downes, 18 Ves. 290; Ex parte Solomon, 1 Gl. & J. 25; Ex parte Middleton, 3 De G. J. & S. 201; Ex parte Ashworth, L. R. 18 Eq. 705; Re Balbirnie, 3 Ch. D. 488; Hooker *v.* Olmstead, 6 Pick. 481; Haxtun *v.* Corse, 2 Barb. Ch. 506; New Bedford Inst. *v.* Fairhaven Bank, 9 Allen, 175; Stewart *v.* Isidor, 1 N. B. R. 485, 5 Abb. Pr. N. S. 68; Re Bloss, 4 N. B. R. 147, Fed. Cas. No. 1562; Wallace *v.* Conrad, 3 N. B. R. 41; Re Granger, 8 N. B. R. 30, Fed. Cas. No. 5684; Re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10,754; Bowley *v.* Bowley, 41 Maine, 542; Johnson *v.* Dickinson, 78 N. Y. 42; Spilman *v.* Johnson, 27 Gratt. 33; Re Bear, 5 Fed. Rep. 53, 7 Fed. Rep. 583; White *v.* Crawford, 9 Fed. Rep. 371.

[5] Ex parte Rippon, L. R. 4 Ch. 639.

bankrupt and his privies nor an encumbrancer or purchaser whose title is subsequent to that of the proving creditor can take advantage of it,[1] but on the contrary the assignees may be subrogated to the right and lien of the security, as against the inferior title.[2] Third persons may have an equity to be subrogated to the waiver; as if the assignees take property upon which a judgment creditor has a lien, and he proves his debt, the waiver will enure to the benefit of the sheriff, who would otherwise have been responsible for not completing the levy.[3] So a proof of the debt may be a waiver of the right to disaffirm a voidable sale; but if action has been begun against the third person before the proof is made, it is not a waiver.[4] The courts require unequivocal evidence that the debt has been proved in full, as a waiver of security is not to be presumed.[5] And, as we have already seen, a proof which has been unadvisedly made may be withdrawn or modified when no new rights have intervened.[6]

The French code declares that secured creditors who vote upon a *concordat* thereby renounce their security. Upon the construction of this Article most writers agree that if the *concordat* should fail to be accepted, still the creditors have lost their security, upon the ground that the failure may have been caused by their own votes. If the *concordat* is annulled by the courts, the rule is otherwise; all creditors are then remitted to their former rights.[7]

[1] Davis *v.* Winn, 2 Allen, 111; Cook *v.* Farrington, 104 Mass. 212; Bassett *v.* Baird, 85 Penn. St. 384; Simmons Co. *v.* Kaufmann, 8 S. W. Rep. 283 (Tex.); Yates *v.* Dodge, 13 N. E. Rep. 847 (Ill.); Smith *v.* Brainerd (Minn.), 35 N. W. Rep. 271.

[2] Wallace *v.* Conrad, 7 Phila. 114, 3 Brewst. 329, 3 N. B. R. 41; Cracknall *v.* Janson, 6 Ch. D. 735; Hiscock *v.* Jaycox, 12 N. B. R. 507, Fed. Cas. No. 6531.

[3] Ansonia Co. *v.* Babbitt, 74 N. Y. 395.

[4] See Ormsby *v.* Dearborn, 116 Mass. 386; Seavey *v.* Potter, 121 Mass. 297; Hotchkiss *v.* Hunt, 49 Maine, 213; Moller *v.* Taska, 87 N. Y. 166.

[5] Hatch *v.* Seeley, 37 Iowa, 493; Re Axtell, 14 L. T. N. S. 260.

[6] *Supra*, § 217. Curtis *v.* Williamson, L. R. 10 Q. B. 57.

[7] Alauzet, No. 2663.

CHAPTER XIV.

DISCHARGE.

§ 423. **Conditions on which a Discharge is Granted.** — It is a part of all bankrupt laws at present to grant a discharge to the debtor if his case comes within certain conditions prescribed by the statute. The moral right of the legislature to release a debt without full payment rests upon a public policy by which the creditors are supposed to lose nothing except a bare right to keep their debts against one who would never be in a position to pay them, if he were not released; while, on the other hand, an honest but unfortunate debtor is restored to usefulness by being permitted to renew his trade.

Such being the theory of the discharge, the legislature may prescribe what conditions it pleases and its grant may be made to depend upon acts or omissions of the debtor before it was passed;[1] but the courts always hesitate to give such a law a retroactive operation when the prohibited act, such as a preference, was not fraudulent at common law.[2] On the other hand an amendment which, in general terms, requires a greater number of creditors to assent to the discharge, or varies the requirements in any other way, is construed to apply to pending cases; and so of a law making the discharge conclusive.[3]

[1] See per *Lord Cranworth*, Ex parte Rufford, 2 De G. M. & G. 234, 241; Ex parte Curties, ib. 255, 262.

[2] Davis *v.* Reynolds, 10 Johns. 442; Re Rosenfield, 1 N. B. R. 575, Fed. Cas. No. 12,058; Re Murdock, 1 Lowell, 362, Fed. Cas. No. 9939; Gove *v.* Lawrence, 26 N. H. 484; Re Keefer, 4 N. B. R. 389, Fed. Cas. No. 7636.

[3] Ex parte Lane, 3 Met. 213; Eastman *v.* Hillard, 7 Met. 420; Re Bartlett, 8 Met. 72; Eddy *v.* Ames, 9 Met. 585; Kempton *v.* Saunders, 130 Mass. 236; Upham *v.* Raymond, 132 Mass. 186; Re Griffiths, 2 Lowell, 340, Fed. Cas. No. 5825; Re King, 3 Dillon, 3, Fed. Cas. No. 7781; Re Perkins, 6 Biss. 185, Fed. Cas. No. 10,983; Re Cerf, 11 N. B. R.

§ 424. **Grant of Discharge not Discretionary.** — When a discharge could be collaterally impeached, it was the practice of the chancellor to grant it in doubtful cases, if he saw no equitable ground to refuse it, because a negative decision was final, while an affirmative one was only provisional.[1] The court of bankruptcy at present decides the question for all the world,[2] and of course must do so upon its best judgment, however difficult the decision may be;[3] and unless discretion is specially given in the statute, none will exist.

By the English Act of 1883 some discretion is given to the court of bankruptcy to grant, refuse, or suspend the order for discharge, and even to revoke it subject to conditions as to his future income or acquisitions;[4] but there is no discretion to grant a discharge if certain acts or omissions are proved against the debtor.[4]

§ 425. **Reviewing or Recalling Discharge.** — By the law of 1867 the court of bankruptcy which had granted a discharge could annul it upon the application within two years thereafter of creditors whose debts were provable in the cause, upon evidence that the discharge had been fraudulently obtained, and that the petitioners had no knowledge of the fraud before the discharge was granted.[5]

Few questions received judicial determination under this section. That the discharge had been "fraudulently obtained" might seem to refer only to some deceit practised upon the court in obtaining it; but the better opinion was that the statute referred to any fraud which would have been a valid objection to the discharge.[6] It was understood, too, I apprehend, that a knowledge of the fraud by the petitioners in order to defeat

143, Fed. Cas. No. 2556; Re Jones, 12 N. B. R. 48, Fed. Cas. No. 7452; but see Re Francke, 7 Ben. 420, Fed. Cas. No. 5046; Re Sheldon, 8 Ben. 67, Fed. Cas. No. 12,747.

[1] Ex parte Hall, 1 Rose, 2; Ex parte Joseph, ib. 184; Ex parte Kennet, ib. 331, 1 Ves. & B. 193; Ex parte Bryant, 1 Gl. & J. 206; Ex parte Stevens, Buck, 389; Ex parte Enderby, 5 Mad. 76.

[2] *Infra*, § 427.

[3] Re Clark, 2 Biss. 73, Fed. Cas. No. 2800; Re Bunster, 5 Ben. 242, Fed. Cas. No. 2136; Re Lathrop, 3 N. B. R. 46, Fed. Cas. No. 8105; Re Mew, 10 W. R. 790; Ex parte Clayton, L. R. 5 Ch. 13.

[4] 46 & 47 Vict. Ch. 52, § 28.

[5] § 34, 14 Stat. 533, Rev. Sts § 5120.

[6] In re Herrick, 7 N. B. R. 341, Fed. Cas. No. 6419; Ex parte Briggs, 2 Lowell, 389, Fed. Cas. No. 1868.

their application, must not only have been before the precise date of the certificate, but before it was practically too late to take advantage of the knowledge, that is, the return day of the bankrupt's application for a discharge.[1] Another fair question would be whether if an issue of fraud had been raised and fairly tried upon the objection of certain creditors in the former proceedings, other creditors, who happened not to know of the trial, could aver their ignorance; that is, whether the issue once tried was not tried for all creditors.[2]

It has been held that the bar of two years is absolute and the time is not enlarged by a failure of the petitioning creditor to discover the fraud within the two years.[3]

Besides any power directly given by the statute, courts of bankruptcy have authority as an incident of their jurisdiction, to correct their records so as to conform to the truth in the matter of discharge as in others.[4] They may even recall a discharge granted by accident or mistake, or obtained by a fraud upon the court if there is no other remedy.[5] Such a reversal must be sought promptly, before the rights of innocent third persons who have dealt with the bankrupt since his discharge have become involved.[6]

§ 426. **Withdrawal of Application for Discharge.** — The court may for cause permit a bankrupt to withdraw his application for a discharge and file a new one;[7] or may even review its decision against him upon a new state of facts; or may annul the bankruptcy, or assent to a composition after the discharge has been once refused. Though these things should be done cautiously, and upon sufficient reasons, they are not open to the objection that third persons may be injured. The only

[1] Re Fowler, 2 Lowell, 122, Fed. Cas. No. 4999.

[2] See Beekman *v.* Wilson, 9 Met. 434; Wales *v.* Lyon, 2 Mich. 276; Buckner *v.* Calcote, 28 Miss. 432; Chapman *v.* Forsyth, 2 How. 202; Humphreys *v.* Swett, 31 Maine, 192.

[3] Mall *v.* Ullrich, 37 Fed. Rep. 653; but see Nicholas *v.* Murray, 18 N. B. R. 469, Fed. Cas. No. 10,223.

[4] In re Dupee, 6 N. B. R. 89; 2 Lowell, 18, Fed. Cas. No. 4183.

[5] Ex parte Tallis, 1 Ball & B. 321; s. c. 1 Rose, 371; Ex parte Cawthorne, 2 Rose, 186; Anon. 2 Rose, 187, note.

[6] Ex parte Buchstein, 9 Ben. 215, Fed. Cas. No. 2076.

[7] Re Svenson, 9 Biss. 69, Fed. Cas. No. 13,659; Ex parte Wallis, 8 Morrell, 110.

persons affected by a discharge are the bankrupt and his creditors existing at the date of the bankruptcy and so long as the case is in court, the creditors must know that a decree of discharge is possible. They should, of course, have full opportunity to be heard on the subject.

§ 427. **Decree of Discharge Conclusive.** — When bankruptcy was dealt with in England by the Lord Chancellor assisted by commissioners, while the discharge or certificate as it was called could not be collaterally impeached for mere irregularity, yet the facts of trading and act of bankruptcy might be inquired of by a jury in a collateral action, which often worked out the same result and was still oftener expensive and vexatious. This inconvenient practice has now been done away; and the discharge is conclusive in England in all collateral actions.[1]

In this country the tendency of decision has always been to hold the discharge conclusive, though some statutes unwisely permitted fraud to be proved in answer to a plea of discharge.[2] Under the Act of 1867 and several others the omission of a creditor from the schedule does not exempt his debt, and that it was done fraudulently cannot under several acts be set up in opposition to the plea,[3] and this rule has been adopted by

[1] Gill *v.* Barron, L. R. 2 P. C. 157; Wadsworth *v.* Pickles, 5 Q. B. D. 470; Bankruptcy Act, 1883, § 30, cl. 3.

[2] See Simms *v.* Slacum, 3 Cranch, 300; Ammidon *v.* Smith, 1 Wheat. 447; Cunningham *v.* Bucklin, 8 Cow. 178; Lester *v.* Thompson, 1 Johns. 300; Sheets *v.* Hawk, 14 S. & R. 173; Fritts *v.* Doe, 22 Penn. St. 335; Stanton *v.* Ellis, 15 N. Y. 575; Soule *v.* Chase, 39 N. Y. 342; Morrison *v.* Woolson, 23 N. H. 11, 29 N. H. 510; Kempton *v.* Saunders, 130 Mass. 236; Rowe *v.* Page, 54 N. H. 190; Richards *v.* Nixon, 20 Penn. St. 19; Blake *v.* Bigelow, 5 Ga. 437; Peterson *v.* Speer, 29 Penn. St. 478; State *v.* Bethune, 8 Ired. 139; Suydam *v.* Walker, 16 Ohio, 122; Card *v.* Walbridge, 18 Ohio, 411; Wright *v.* Watkins, 2 G. Greene (Iowa), 547.

[3] Burnside *v.* Brigham, 8 Met. 75; Williams *v.* Coggeshall, 11 Cush. 442; Burpee *v.* Sparhawk, 108 Mass. 111; Way *v.* Howe, ib. 502; Black *v.* Blazo, 117 Mass. 17; Fuller *v.* Pease, 144 Mass. 390; Brown *v.* Cov. Mut. L. I. Co., 86 Mo. 51; Talbott *v.* Suit, 68 Md. 443; Stetson *v.* Bangor, 56 Maine, 274; Corey *v.* Ripley, 57 Maine, 69; Bailey *v.* Corruthers, 71 Maine, 172; Alston *v.* Robinett, 9 N. B. R. 74, 37 Tex. 56; Linn *v.* Hamilton, 34 N. J. Law, 305; Ocean Bk. *v.* Olcott, 46 N. Y. 12; Payne *v.* Able, 7 Bush, 344; Parker *v.* Atwood, 52 N. H. 181; Thurmond *v.* Andrews, 10 Bush, 400; Stevens *v.* Brown, 49 Miss. 597; Beardsley *v.* Hall, 36 Conn. 270; Milhous *v.* Aicardi, 51 Ala. 594; Smith *v.* Ramsey, 15 N. B. R. 447; Rayl *v.* Lapham, 27 Ohio St. 452; Howland *v.* Carson, 28 Ohio St. 625; Seymour *v.* Street, 5 Neb. 85. See for a peculiar exception Poillon *v.* Lawrence, 77 N. Y. 207.

the legislature of Massachusetts, and is constitutional, and applies to cases pending when the statute was passed.[1] In a few cases it was held that fraud on a particular creditor by omitting his name from the schedule would authorize him to impeach the discharge collaterally,[2] but these rulings assumed unwarrantably that such a fraud could not be set up by other creditors to prevent the discharge, and was therefore a *casus omissus*.

§ 428. **Application for Discharge is heard as soon as possible.** — It is the intent of the statutes and the practice of the courts to expedite the hearing and decision of this question, as far as is consistent with justice. They will, therefore, refuse to await the result of protracted litigation in other courts, such as suits involving disputed accounts, titles, etc., though they might, if settled, affect the opinion of the court as to the conduct of the bankrupt, or the amount of assets or debts, and thus incidentally the right to a discharge.[3] The proceedings, however, should be postponed to permit proof by creditors who from no fault of their own have been unable to prove, if their action may possibly have an influence upon the decision; as when the discharge depends upon the votes of creditors;[4] otherwise, when it can have no effect.[5]

§ 429. **Provable Debts are Discharged.** — All debts made provable by the statute are discharged unless expressly excepted by the statute itself, and this whether they could in fact be proved or not, and whether the creditor was notified or not.[6] And, on the other hand, debts not of a kind to be

[1] Stat. (Mass.) 1879, c. 245, § 4; Pub. Sts. c. 157, § 81; Kempton *v.* Saunders, 130 Mass. 236.

[2] See Batchelder *v.* Low, 43 Vt. 662; Poillon *v.* Lawrence, 77 N. Y. 207.

[3] Ex parte Lee, L. R. 3 Ch. 150; Ex parte Rayne, ib. 152; Ex parte Johnson, 1 Atk. 81; Ex parte Blaydes, 1 Gl. & J. 179.

[4] Ex parte Smith, 1 Gl. & J. 195; Ex parte Whitchurch, ib. 71; Ex parte Skipp, 1 Dea. & Ch. 497; Ex parte May, 3 Dea. 382; Ex parte Lord, 2 Rose, 421.

[5] Ex parte May, Mont. & Ch. 18; Ex parte Whitworth, 2 M. D. & De G. 133.

[6] See note 1, page 304, and Small *v.* Graves, 7 Barb. 576; Hubbell *v.* Cramp, 11 Paige, 310; Platt *v.* Parker, 13 N. B. R. 14; Thurmond *v.* Andrews, ib. 157, 10 Bush, 400; Hoyles *v.* Blore, 14 M. & W. 387; Heather *v.* Webb, 2 C. P. D. 1; Burnside *v.* Brigham, 8 Met. 75; Knabe *v.* Hayes, 71 N. C. 109; Heard *v.* Arnold, 56 Ga. 570; Hurd *v.* Ind. Mut. Ins. Co., 1 Ind. 162;

proved are not discharged.[1] Consequently many of the questions arising on a plea of discharge may be answered by reference to the preceding chapter on provable debts. There are, however, some exceptions proper to be considered here.

§ 430. **Attachments for Contempt.** — "Proceedings for contempt may be either for the purpose of inflicting punishment upon one who has wilfully disobeyed a lawful order of the court, or for the purpose of obtaining the result which might have been reached by the enforcement of its decree but for the intervention of the wrongful act of the party violating its order, or in appropriate cases for both purposes." *Devens, J.*, McCann *v.* Randall, 147 Mass. 81, 90.

Attachments for non-payment of money into court by an attorney or by any party to an action, though nominally for contempt, are really to coerce the payment, and are discharged by the debtor's certificate in bankruptcy or his discharge in insolvency if, considered as debts, they would be discharged, that is, if not fraudulently incurred or coming within some other exception.[2] Nor does it make any difference that the form is criminal. Fines and costs under an indictment or information, if for the benefit of the prosecutor, are debts in this connection.[2] An attachment for con-

Thornton *v.* Hogan, 63 Mo. 143; Stemmons *v.* Burford, 39 Tex. 352; Thomas *v.* Jones, 39 Wis. 124; Pattison *v.* Wilbur, 10 R. I. 448; Black *v.* Blazo, 117 Mass. 17; Corey *v.* Ripley, 57 Maine, 69; Milhous *v.* Aicardi, 51 Ala. 594; Ocean Bank *v.* Olcott, 46 N. Y. 12; Parker *v.* Atwood, 52 N. H. 181; Wadsworth *v.* Pickles, 5 Q. B. D. 470; Hapgood *v.* Blood, 11 Gray, 400; Bickford *v.* Barnard, 8 Allen, 314; Whiton *v.* Nichols, 3 Allen, 583.

[1] See note 6, page 302.

[2] 4 Blackst. Com. 285; Baker's Case, 2 Str. 1152; Ex parte Parker, 3 Ves. 554; Rex *v.* Wakefield, 13 East, 190; Re McWilliams, 1 Sch. & Lef. 169; Ex parte Jeyes, 3 Dea. & Ch. 764; Ex parte Bury, 3 M. D. & De G. 309; Ex parte Hooson, L. R. 8 Ch. 231; Hendryx *v.* Fitzpatrick, 19 Fed. Rep. 810, and cases; Rex *v.* Stokes, Cowp. 136; Reg. *v.* Thornton, 4 Ex. 820; Queen *v.* Hills, 2 E. & B. 176; Ex parte Eicke, 1 Gl. & J. 261; Wall *v.* Atkinson, 2 Rose, 196; Wyllie *v.* Green, 1 De G. & J. 410; Anon. 2 P. Wms. 481; Rex *v.* Pickerill, 4 T. R. 809; Const *v.* Ebers, 1 Mad. 530; Smith *v.* Blofield, 2 Ves. & B. 100; Jackson *v.* Billings, 1 Caines, 252; People *v.* Craft, 7 Paige, 325; Buffum's Case, 13 N. H. 14; The King *v.* Myers, 1 T. R. 265; Ex parte Culliford, 8 B. & C. 220; Rex *v.* Edwards, 9 B. & C. 652; Lees *v.* Newton, L. R. 1 C. P. 658; Re Rawlins, 12 L. T. N. S. 57; Ex parte Muirhead, 2 Ch. D. 22; Re Manning, 30 Ch. D. 480.

tempt in respect to some act, other than payment of money, such as refusing to sign an answer in Chancery, is not discharged, because the order is intended to enforce a specific performance which has not become impossible by reason of the bankruptcy. So it was held in a case in which the supreme court were so much divided in their reasons that only the result was announced, that a fine imposed for breach of an injunction was not discharged.[1] The fine had not been made payable wholly to the plaintiff, so that the decision is not opposed to those cited in the preceding notes.[1]

In an early case it was held that a defendant in Chancery, who was held for non-payment of fees after submitting to answer, and was afterwards discharged in insolvency, could not obtain redress at law by *habeas corpus*, but must apply to the Court of Chancery.[2] This was a question of the distribution of powers or of courtesy between different courts, and therefore sound. If the petitioner had applied to the Court of Chancery without effect, an application to the Queen's Bench might have been in order.

Where the fine for contempt is intended as punishment, it is *quasi* criminal, and can be reached only by a pardon, or under some statutes the prisoner may be discharged as a poor debtor.[3] Whether the court would discharge its own officer, such as an attorney, depended sometimes upon whether the debt was fraudulently contracted.[4] But the bankrupt law now provides for that matter by excepting such debts from the operation of the discharge.[5]

§ 431. **Debts Excepted from Discharge.** — It seems eminently fit to exclude from the operation of a discharge in bankruptcy debts which have been improperly contracted by the bankrupt to innocent persons without their intelligent assent such as

[1] Spalding *v.* The People, 10 Paige, 284; 7 Hill, 301; 4 How. 21 (see the statute under which the fine was imposed explained in People *v.* Compton, 1 Duer, 512); Macy *v.* Jordan, 2 Denio, 576.

[2] Ex parte Lawrence, 1 B. & P. 477.

[3] See Spalding *v.* People, *supra*, note 1; Bancroft *v.* Mitchell, L. R. 2 Q. B. 549; Ex parte Graves, L. R. 3 Ch. 642; The King *v.* Samson, 11 East, 231.

[4] Ex parte Bonner, 4 B. & Ad. 811.

[5] *Infra*, § 433.

defalcations by a public officer, debts by a trustee to his *cestuis que trustent*, and those incurred by positive fraud on the creditor. Under a statute containing no exceptions all such debts will be discharged.[1] Formerly some such debts were saved by being classed as torts; but the modern statutes more wisely have excepted them all by name and description, and have, on the other hand, abolished the technical distinction between contract and tort as a test of the effect of a discharge.

§ 432. **Fiduciary Debts.** — The exception of fiduciary debts by the acts of 1841 and 1867 was so expressed as to apply only to direct trusts by deed or will, or by the appointment of a court, such as executors, receivers, assignees in bankruptcy. Factors, bankers, brokers, agents, pledgees, attorneys,[2] including, perhaps, attorneys-at-law,[3] were by a discharge under these acts released from their debts to their principals. In the English law, "breach of trust" is given a more extended meaning. If there has been positive fraud in the transactions, the debt comes within an express exception which affects all fraudulent debtors.[4]

Where one is *quasi* trustee from having, without fraud, dealt with a trustee, his liability, if in the form of a money

[1] Walcott *v.* Hall, 2 Brown C. C. 305; Ex parte Holt, 1 Dea. 248; Very *v.* McHenry, 29 Maine, 206; Re McWilliams, 1 Sch. & Lef. 169.

[2] Chapman *v.* Forsyth, 2 How. 202; Hennequin *v.* Clews, 111 U. S. 676, affirming 77 N. Y. 427; Beal *v.* Clark, 95 U. S. 704; Halpine *v.* May, 100 Mass. 498; Wolf *v.* Stix, 99 U. S. 1; Cronan *v.* Cotting, 104 Mass. 245; Grover *v.* Clinton, 5 Biss. 324, Fed. Cas. No. 5845; Woolsey *v.* Cade, 15 N. B. R. 238; Pankey *v.* Nolan, 6 Humph. 154; Noble *v.* Hammond, 129 U. S. 65; Upshur *v.* Briscoe, 138 U. S. 365; Owsley *v.* Cobin, 15 N. B. R. 489; Fed. Cas. No. 10,636; Re Smith, 9 Ben. 494, Fed. Cas. No. 12,976; Banning *v.* Bleakley, 27 La. An. 257; Mulock *v.* Byrnes, 129 N. Y. 23; Palmer *v.* Hussey, 87 N. Y. 303, affirmed 119 U. S. 96; Treadwell *v.* Holloway, 46 Cal. 547; Meador *v.* Sharpe, 14 N. B. R. 492; Pierce *v.* Shippee, 19 N. B. R. 221; Green *v.* Chilton, 57 Miss. 598; Hervey *v.* Devereux, 72 N. C. 463; Phillips *v.* Russell, 42 Maine, 360; Austill *v.* Crawford, 7 Ala. 335; Slayton *v.* Wells, 66 Vt. 62.

[3] Hayman *v.* Pond, 7 Met. 328; Wolcott *v.* Hodge, 15 Gray, 547, and see *supra*, "Attachments for Contempt," § 430; Woodward *v.* Towne, 127 Mass. 41. See Flanagan *v.* Pearson, 14 N. B. R. 37.

[4] See the discussion by *Bradley, J.*, in Hennequin *v.* Clews, 111 U. S. 676, 682, and cases; Crowther *v.* Elgood, 34 Ch. D. 691; Upshur *v.* Briscoe, 138 U. S. 365.

demand, is not fiduciary, and so of all merely *quasi* trusts.[1] So the liability of a surety upon the bond of a fiduciary debtor is not itself fiduciary.[2]

It will be noticed that if a factor or agent has specific property of his principal, it will not belong to the assignees of the agent, and therefore he will be liable if he wilfully turns it over to his assignees or otherwise wrongfully disposes of it after he becomes bankrupt.[3]

In Hennequin *v.* Clews,[4] the supreme court held that a firm who had improperly disposed of securities deposited with them as security for drafts which were never dishonored had not contracted the debt while acting in a fiduciary capacity; and that it was not a debt created by fraud. The latter proposition seems doubtful.[5] In Massachusetts a statute has declared such a debt to be without the scope of a discharge under the state law.[6] The decision has been reaffirmed, and its analogy has been followed in later cases.[7] The English statutes have used more general and wider expressions, under which any breach of trust is included.[8]

§ 433. **Debts fraudulently incurred or created.** — The recent statutes except from the operation of the discharge debts which have been fraudulently "created" or "incurred;" the former word was used in our statute of 1867, and the latter in the English laws of 1869, and 1883.[9] The law refers to actual fraud, such as obtaining goods by false pretences or false representations of solvency, or with intent not to pay for them, if that is a fraud by the *lex loci*, or other act which is a

[1] Neal *v.* Clark, 95 U. S. 704.

[2] Jones *v.* Knox, 46 Ala. 53; Ex parte Taylor, 16 N. B. R. 40, Fed. Cas. No. 13,773; U. S. *v.* Davis, 3 McLean, 483, Fed. Cas. No. 14,929; Fowler *v.* Kendall, 44 Maine, 448; McMinn *v.* Allen, 67 N. Car. 131; Miller *v.* Gillespie, 59 Mo. 220.

[3] Bowstead, Agency, 2nd ed. p. 343.

[4] 111 U. S. 676, affirming 77 N. Y. 427.

[5] See Upshur *v.* Briscoe, 37 La. An. 138.

[6] Stats. Mass. 1885, c. 353, § 6.

[7] Palmer *v.* Hussey, 119 U. S. 96, *ante*, affirming 87 N. Y. 303; Stratford *v.* Jones, 97 N. Y. 586; see cases cited *ante*, note 2, page 305.

[8] Robson, Bankruptcy, 7th ed. p. 656. Re Greer, 2 Manson, 350.

[9] Robson, Bankruptcy, 7th ed. p. 656. See Re McEachran, 82 Cal. 219; Dyer *v.* Bradley, 89 Cal. 557; Siegel *v.* Creditors, 95 Cal. 409; Re Koeppler, 75 N. W. Rep. 789 (N. D.).

fraud by that law. All debts thus contracted are exempt.[1] Where a solicitor brought an action wilfully, without authority from the plaintiff, and was ordered to pay the defendant's costs, it was held in England that he had incurred this debt fraudulently.[2] A wrong, however great, such as seduction, which is the consideration of a debt, does not affect the question of discharge if there were no fraud.[3] The merely conventional fraud of receiving a preference is not within the exception, and a creditor who had been ordered to pay the amount of his preference into court was relieved by his discharge in bankruptcy.[4] A debt which would not be discharged may become so by deliberate condonation, as when the personal note of a trustee is accepted for a balance due in his fiduciary capacity.[5]

The fraud must have been committed in contracting the debt. It is no answer to the discharge that the defendant by fraud induced the plaintiff to forbear action upon it, or misled a surety by falsely representing that he had paid it, or attempted to support a title to property for which a forthcoming bond was given by fraudulent evidence.[6] In the English statute, obtaining forbearance by fraud is expressly mentioned.[7]

When a partnership debt was incurred by the fraud of one partner, the discharge was held to be no defence to either partner.[8]

[1] See as to what are or are not such frauds, Stokes *v.* Mason, 10 R. I. 261; Stewart *v.* Emerson, 52 N. H. 301; Morse *v.* Hutchins, 102 Mass. 439; Turner *v.* Atwood, 124 Mass. 411; Brenner *v.* Duard, 126 Mass. 400; Wilson *v.* Hawley, 158 Mass. 250; Classen *v.* Schoenemann, 80 Ill. 304; Broadnax *v.* Bradford, 50 Ala. 270; Ex parte Coker, L. R. 10 Ch. 652; Ames *v.* Moir, 130 Ill. 582, affirmed 138 U. S. 306; Strang *v.* Bradner, 114 U. S. 555.

[2] Jenkins *v.* Fereday, L. R. 7 C. P. 358.

[3] Howland *v.* Carson, 16 N. B. R. 372; see Flanagan *v.* Cary, 37 Tex. 67; Cole *v.* Roach, ib. 413.

[4] Ex parte Hooson, L. R. 8 Ch. 231.

[5] Amoskeag Company *v.* Barnes, 49 N. H. 312; Commrs. of Wilkes *v.* Staley, 82 N. C. 395; Elliott *v.* Higgins, 83 N. C. 459; *a fortiori* the note of a third person, Hervey *v.* Devereux, 72 N. C. 463.

[6] U. S. *v.* Rob Roy, 1 Woods, 42, Fed. Cas. No. 16,179; Brown *v.* Broach, 52 Miss. 536; Broadnax *v.* Bradford, 50 Ala. 270.

[7] Bankruptcy Act 1883, § 30, cl. 1.

[8] Cooper *v.* Prichard, 11 Q. B. D. 351; Strang *v.* Bradner, 114 U. S. 555.

§ 434. **Defalcation.** — "Defalcation" of an officer is classed with frauds and breaches of trust, and means a fraudulent defalcation. Damages against an officer for converting the plaintiff's property innocently, on process against a third person, or damages for failure to collect an execution and the like, are not defalcations.[1]

The burden of proof is on the creditor to prove fraud, and he must plead it regularly.[2]

§ 435. **Judgment in an Action for Fraud.** — If judgment is obtained upon a declaration setting out fraud and making it an issue, the judgment does not merge the fraud, but conclusively ascertains it, and will not be barred by a subsequent discharge.[3]

If a creditor whose debt was fraudulently contracted by his debtor sues upon it as a mere debt, and obtains a judgment, so that the record discloses nothing concerning a fraud, there is a conflict of authority upon the question whether the fraud in contracting the original debt is merged and incapable of being used against a discharge afterwards obtained. The weight of opinion is that there is no merger, for the reason that a judgment is, for many purposes, merely a higher security which the creditor has a right to obtain, to save the statute of limitations without waiving the question of fraud which, in many cases, could not be raised or decided in such an action.[4] Some of the New York cases in which the question is discussed turn upon a point of practice, whether a summary arrest shall be granted in an action on such a judgment.[5]

§ 436. **Debts of Bankrupt's Wife.** — By the common law the wife's debts contracted *dum sola* are discharged by the husband's

[1] Carpenter *v.* Turrell, 100 Mass. 450; Hayes *v.* Nash, 129 Mass. 62; Courtney *v.* Beale, 84 Va. 692.

[2] Burnham *v.* Noyes, 125 Mass. 85; Kellogg *v.* Kimball, 135 Mass. 125.

[3] Horner *v.* Spelman, 78 Ill. 206; Re Patterson, 2 Ben. 155, Fed. Cas. No. 10,817. See Jordan *v.* Downey, 40 Md. 401; Whittaker *v.* Chapman, 3 Lans. 155; Warner *v.* Cronkhite, 6 Biss. 453, Fed. Cas. No. 17,180.

[4] In favor of the merger, Palmer *v.* Preston, 45 Vt. 154; Bangs *v.* Watson, 9 Gray, 211. *Contra*, Re Pitts, 19 N. B. R. 63, Fed. Cas. No. 11,190, explaining Re Robinson, 2 N. B. R. 341, Fed. Cas. No. 11,939; Betts *v.* Bagley, 12 Pick. 572; Smith *v.* Randall, 1 Allen, 456, judgment for necessaries, debt for which was not proved; Packer *v.* Whittier, 91 Fed. Rep. 511. See Boynton *v.* Ball, 121 U. S. 457; Huntington *v.* Saunders, 166 Mass. 92; Bennett *v.* Justices of Municipal Court, 166 Mass. 126.

[5] Shuman *v.* Strauss, 52 N. Y. 404.

certificate, because by the marriage he assumed them and she could not be sued.[1] In one case it was intimated that the remedy was only suspended by the husband's discharge, and would revive if the wife should outlive the husband.[2]

Where the wife is by statute, or by customary law, responsible for her own debts, either absolutely or in some contingencies, she is, of course, equally responsible after her husband's discharge.[3] Where the law permits the husband to contract directly with his wife, the discharge of either will release a debt due from that one to the other.[4] In equity, if the separate property of a wife is chargeable with certain debts, the discharge of the husband will not affect this liability.[5] Even at law the court will not release a wife charged in execution, on the ground of her husband's discharge, if she has separate property.[6]

§ 437. **Collateral Undertakings; Covenants.** — Under the earlier statutes, a collateral obligation, remedy or covenant might be enforced notwithstanding the debt to which it was collateral had been discharged, likening covenants to actual charges upon property. Thus judgment might be entered upon a cognovit;[7] or a distress might be enforced by a landlord;[8] or a covenant to convey after-acquired property might be enforced in equity;[9] or a covenant to insure, at law.[10] It was intimated by some judges that if the debt were proved, the collateral undertaking might perhaps be discharged.[11] All liabilities connected with a provable unsecured debt, are, by the latest English statute and decisions, discharged with the

[1] Miles *v.* Williams, 1 P. Wms 249; Re McWilliams, 1 Sch. & Lef. 169; Lockwood *v.* Salter, 5 B. & Ad. 303.

[2] Vanderheyden *v.* Mallory, 1 N. Y. 452.

[3] Dickson *v.* Miller, 11 Sm. & M. 594; Mobley *v.* Cureton, 6 So. Car. 49.

[4] Alling *v.* Egan, 11 Rob. (La.) 244.

[5] Hamlin *v.* Bridge, 24 Maine, 145; Chubb *v.* Stretch, L. R. 9 Eq. 555.

[6] Sparkes *v.* Bell, 8 B. & C. 1. See Biscoe *v.* Kennedy, 1 Bro. C. C. 17 n.; Bonner *v.* Bonner, 17 Beav. 86; Ex parte Deacon, 5 B. & A. 759, changed by 7 Geo. IV. c. 57, § 72.

[7] Wyborne *v.* Ross, 2 Taunt. 68.

[8] Newton *v.* Scott, 9 M. & W. 434, 10 id. 471; Phillips *v.* Shervill, 6 Q. B. 944.

[9] Lyde *v.* Mynn, 4 Sim. 505, 1 M. & K. 683; Smith *v.* Baker, 1 Y. & C. (Ch.) 223; Re Inkson's Trusts, 21 Beav. 310; Re Duggan's Trusts, L. R. 8 Eq. 697.

[10] Warburg *v.* Tucker, E. B. & E. 914; Mitcalfe *v.* Hanson, L. R. 1 H. L. 242.

[11] See Warburg *v.* Tucker, E. B. & E. 914, 926, per *Bramwell, B.*; Deering *v.* Bank of Ireland, 12 App. Cas. 20, 24, per *Lord Watson.*

debt itself, as they should be.[1] Our late statute seems to be equally broad.

Whether, when a state insolvent law subjects after-acquired property of the insolvent to the payment of his old debts, this right or title once duly acquired can be enforced when a bankrupt law has afterwards been passed by congress, or after a discharge of the debtor under such a law is an open question.[2] In England, when there was an insolvent law, the statute preserved this right,[3] but at that time collateral liabilities were not provable. By the present law, the rule will probably be different.[4]

§ 438. **Covenants of Title; Estoppel.** — One who has conveyed with covenants of title, and afterwards is discharged in bankruptcy, and who has bought up a title from his assignees, or from a third person, does not acquire the right to enforce such a title against his covenantee or lien creditor or fraudulent grantee, though the person from whom he purchased might have done so. He remains, notwithstanding his discharge, bound by his own acts, deeds and covenants, by way of estoppel.[5] This rule, of course, does not apply when he buys as trustee for another, though the trust is only a resulting one.[6]

§ 439. **Debts due the State.** — A discharge in bankruptcy does not release a debt due the Crown, unless expressly mentioned in the statute.[7] This perogative right has been retained, by decision, in this country in the courts of the United States and of several of the States,[8] though not in all.[9] The United

[1] Thompson *v.* Cohen, L. R. 7 Q. B. 527; Cole *v.* Kernot, ib. 534 n.; Collyer *v.* Isaacs, 19 Ch. D. 342.

[2] See Beach *v.* Miller, 15 La. An. 601, and Lavender *v.* Gosnell, 43 Md. 153; Oliphint *v.* Eckerly, 36 Ark. 69; Ex parte Pain, L. R. 3 Ch. 639; Collyer *v.* Isaacs, 19 Ch. D. 342.

[3] 1 & 2 Vict. c. 110, § 40; Ex parte Pain, L. R. 3 Ch. 639.

[4] Collyer *v.* Isaacs, 19 Ch. D. 342.

[5] Gibbs *v.* Thayer, 6 Cush. 30; Dorsey *v.* Gassaway, 2 Har. & J. 402; Stewart *v.* Anderson, 10 Ala. 504; Bush *v.* Cooper, 26 Miss. 599, affirmed 18 How. 82; Re Burton, 29 Fed. Rep. 637; Chamberlain *v.* Meeder, 16 N. H. 381; Kezer *v.* Clifford, 59 N. H. 208.

[6] Gregory *v.* Peoples, 80 Va. 355.

[7] Anon. 1 Atk. 262; Rex *v.* Pixley, Bunb. 202; Awdley *v.* Halsey, W. Jones, 202.

[8] United States *v.* Herron, 20 Wall. 251. See United States *v.* Tetlow, 2 Lowell, 159, Fed. Cas. No. 16,456; People *v.* Rossiter, 4 Cow. 143; People *v.* Herkimer, ib. 345; Commonwealth *v.* Hutchinson, 10 Penn. St. 466; Saunders *v.* Commonwealth, 10 Gratt. 494; Clements *v.* Camden, 51 N. J. Law, 424.

[9] State *v.* Walsh, 2 Gill & J. 406.

States will not be barred by a certificate granted under a law of a State for a stronger reason, lack of power in the State to impair the right of the United States.[1] There is a *dictum* by Marshall C. J. that if the United States were not mentioned in the statute and elected to prove a debt, it would be discharged. The decision in that case was against the discharge because the statute expressly exempted the United States and the States from its operation. There is little doubt, however, that there may be a waiver of this prerogative right.[2] Laws discharging the person of poor debtors to the United States were passed very early by Congress, and are applied now even to fines. This policy has been adopted in the several States.

A surety for a debt due the Crown paying the debt is subrogated to all the securities and to the priority of payment; but must avail himself of this right if he would receive full payment, for he will be barred by the discharge.[3] By the latest bankrupt law of England the Treasury may certify in writing their consent to the discharge, which will then bind the Crown.[4]

§ 440. **Costs and Expenses Connected with Provable Debts.** — Formerly the law made no provision for proving costs which had accrued to the plaintiff in an action upon a debt, unless a verdict had been obtained before the defendant was adjudicated bankrupt. So of damages and expenses connected with the protest of bills of exchange.[5] Most of these anomalies are redressed by later statutes, but whether they are or not, such costs, expenses and damages cannot be recovered after the debtor has obtained his discharge[6] because they are merely

[1] United States *v.* Wilson, 8 Wheat. 253; Glenn *v.* Humphreys, 4 Wash. C. C. 424, Fed. Cas. No. 5480.

[2] Harrison *v.* Sterry, 5 Cranch, 289. See United States *v.* Tetlow, 2 Lowell, 159, Fed. Cas. No. 16,456.

[3] Westcott *v.* Hodges, 5 B. & A. 12; Rex *v.* Bingham, 2 Cr. & J. 130, and 1 C. & M. 862; Reed *v.* Emory, 1 S. & R. 339; Aikin *v.* Dunlap, 16 Johns. 77; Manisty *v.* Churchill, 39 Ch. D. 174; Rex *v.* Bennett, 1 Wight. 1.

[4] Bankruptcy Act, 1883, § 30, cl. 1.

[5] *Supra*, §§ 187, 189.

[6] Van Sandan *v.* Corsbie, 8 Taunt. 550; 3 B. & A. 13; Phillips *v.* Brown, 6 T. R. 282; Scott *v.* Ambrose, 3 M. & S. 326; Lewis *v.* Piercy, 1 H. Bl. 29; Southgate *v.* Saunders, 5 Ex. 565; Simpson *v.* Mirabita, L. R. 4 Q. B. 257

incidental to a debt which is released. So where a surety contests his liability by which interest and costs are recovered against him, though he can prove in the bankruptcy of his principal only the amount which the creditor could have proved,[1] he has no remedy against his discharged principal for the excess.[2]

§ 441. **Alimony; Support of Children.** — The courts are disinclined to permit the discharge of a bankrupt to release him from obligations to support his wife and children though they may have been entered into before his bankruptcy, such as alimony, etc. It is held that such liabilities are incapable of valuation, because they may be varied by the courts from time to time, and that they are hardly like other debts.[3] Accordingly, while it is held that covenants to convey property as security are discharged by the certificate, it is seriously doubted whether the rule applies to covenants in a marriage settlement to settle after-acquired property for the benefit of the wife. This doubt appears well founded, for the covenant is to do an act rather than to pay a debt.[4] In some cases the duty is imposed by statute, and the breach is punishable by fine, and therefore not within the bankrupt law.[5]

§ 442. **Continuing Contract; Apportionment.** — If the bankrupt is a party to an unfinished contract which his assignees elect not to assume, or which does not pass to them, damages which accrue to the other party to the contract after the date to which the discharge relates are not barred unless there is some special provision for that purpose in the statute or the other has availed of some power to rescind.[6] And for benefits

(disapproving Maughan *v.* Vinesberg, L. R. 3 C. P. 318); Willett *v.* Pringle, 2 B. & P. N. R. 190; McKeown *v.* Gurney, 147 Mass. 192.

[1] *Supra*, § 195.

[2] Fisher *v.* Tifft, 127 Mass. 313.

[3] Millen *v.* Whittenbury, 1 Camp. 428; Overseers of St. Martin's *v.* Warren, 1 B. & A. 491; Davies *v.* Arnott, 3 Bing. 154; Mudge *v.* Rowan, L. R. 3 Ex. 85; Re Garrett, 2 Hughes, 235, Fed. Cas. No. 5252; Bancroft *v.* Mitchell, L. R. 2 Q. B. 549; Re Robinson, 27 Ch. D. 160; Linton *v.* Linton, 15 Q. B. D. 239; Newhouse *v.* Comm. 5 Whart. 82; Comm. *v.* Miller, 34 Leg. Int. 20. See *supra*, § 172.

[4] See *dicta* in Collyer *v.* Isaacs, 19 Ch. D. 342; Lyde *v.* Mynn, 4 Sim. 505; 1 Myl. & K. 683.

[5] See cases *supra*, § 190.

[6] Thomas *v.* Williams, 1 A. & E. 685; Hopkins *v.* Thomas, 7 C. B. N. S. 711.

received or debts accruing after that date under a continuing contract the discharged bankrupt must pay.[1]

The most common example of this is rent accruing after the bankruptcy.[2] If the assignee has not taken shares in a company, so that they remain the property of the bankrupt it has been held that "calls" or assessments made after the bankruptcy are not discharged.[3]

§ 443. **Form of Action; Election to Prove.** — Formerly the mere form of action might decide whether a discharge was a bar; for if the creditor's debt was of such a nature that he had an election to sue in tort and did so sue, the plea of discharge in bankruptcy was bad, though he might have waived the tort and proved in the bankruptcy.[4] The injustice of this rule, which substituted form for substance, was pointed out by Judge Livingston in New York.[5] But his decision was in advance of his time and was overruled.[6] One reason, though an inadequate one, given for the old distinction was that debts contracted by fraud ought not to be barred,[7] is now met by direct legislation which excepts all debts so contracted.

The law at present is different. All claims which can be called debts under the statute are provable, including in many statutes, damages for the conversion of personal property, and are of course discharged. It is in vain now for the creditor to bring his action in tort after the debtor has procured his discharge.[8] Accordingly it has been held that in an action for breaking and entering the plaintiff's close and converting his goods, the defendant may plead his discharge to all that part of the declaration which relates to the conversion.[9] And so of all similar actions. An able judge has said in sustaining a plea of discharge to an action on the case for breach of warranty: "A

[1] Stinemets *v.* Ainslie, 4 Denio, 573; Robinson *v.* Pesant, 53 N. Y. 419.

[2] *Supra*, § 169.

[3] Glenn *v.* Howard, 65 Md. 40.

[4] Gulliver *v.* Drinkwater, 2 T. R. 261; Lloyd *v.* Peell, 3 B. & A. 407; Parker *v.* Norton, 6 T. R. 695.

[5] Hatten *v.* Speyer, 1 Johns. 37.

[6] Kennedy *v.* Strong, 14 Johns. 128, affirming 10 Johns. 289.

[7] Parker *v.* Crole, 5 Bing. 63, per *Best, C. J.*

[8] Brown *v.* Treat, 1 Hill, 225; Campbell *v.* Perkins, 8 N. Y. 430; Merrill *v.* Schwartz, 68 Maine, 514; Hayes *v.* Nash, 129 Mass. 62.

[9] Bickford *v.* Barnard, 8 Allen, 314.

contract cannot be converted into a tort by the mere use of vituperative language in the declaration."[1]

Some statutes have required an election. Thus a statute of Massachusetts discharged debts for necessaries if they were proved,[2] and the act of Congress of 1841 had a similar provision in case of fiduciary debts. This is unjust, because it puts a creditor who is intended to be favored in a position which may be unfavorable. The better rule is that they shall prove their debts and give credit for the dividends.[3] When election to prove discharges the exempted debt, a withdrawal of proof by leave of court revives the exemption.[4]

§ 444. **Personal Exemption of a Creditor.** — When a creditor's exemption is merely personal to him, as, if he is beyond the jurisdiction, or is omitted from the schedule (if that is made a statutory exemption), or if he was a creditor under an earlier bankruptcy in which the debtor was refused his discharge; in these and similar cases he loses his privilege by proving his debt, because he thereby takes the benefit of the proceedings, and must take the burden also.[5]

§ 445. **Bail Bonds and Recognizances.** — Bail are not liable for the debt until default, and if in the meantime the debtor receives his discharge, they will be exonerated by the court in a summary mode without actual surrender of the principal, if the debt is one which will be discharged.[6] After they are "fixed" the debt becomes their own, and they will remain liable like other sureties.[7]

§ 446. **Discharge is Personal.** — A discharge is personal to the bankrupt, and does not affect any lawful lien, charge, or incumbrance existing on his property, but judgment may be

[1] Merrill *v.* Schwartz, 68 Maine, 514.

[2] Pub. Sts. c. 157, § 84.

[3] Talcott *v.* Harris, 93 N. Y. 567; Rev. Sts. U. S. § 5117.

[4] Morse *v.* Lowell, 7 Met. 152.

[5] Clay *v.* Smith, 3 Pet. 411; Van Hook *v.* Whitlock, 7 Paige, 373, affirmed, 26 Wend. 43; Jones *v.* Horsey, 4 Md. 306; Journeay *v.* Gardner, 11 Cush. 355; Gilman *v.* Lockwood, 4 Wall. 409; Gilbert *v.* Hebard, 8 Met. 129; Burpee *v.* Sparhawk, 108 Mass. 111; Murray *v.* Roberts, 150 Mass. 353.

[6] Mannin *v.* Partridge, 14 East, 599; Boggs *v.* Teackle, 5 Binn. 332; Olcott *v.* Lilly, 4 Johns. 407; Cunningham *v.* Brown, 5 Cow. 289; Geikie *v.* Hewson, 4 M. & G. 618.

[7] Champion *v.* Noyes, 2 Mass. 481; Beers *v.* Haughton, 9 Pet. 329.

specially entered thereon *in rem*.[1] If the debtor himself does not choose to plead his discharge, a third person cannot avail of it, as, for instance, a creditor attaching a debt due the bankrupt after his discharge cannot object to a set-off by the garnishee of a debt due before, and a first indorser cannot object that a second indorser was discharged and need not have paid the note.[2] So, though judgment creditors have a right to dispute the consideration of earlier judgments, it is no sound objection that a judgment was rendered with the debtor's consent for a debt discharged in bankruptcy.[3] So if a bill is pending against the bankrupt and others alleged to be fraudulent trustees for him, his discharge releases only him.[4] The cases cited for this point are some of them wrongly decided because they overlooked the consideration that the assignee has the exclusive right to set aside frauds,[5] but the bankrupt's discharge has nothing to do with the question.

So the discharge does not relieve any one liable for a debt of the bankrupt as co-partner, surety, or otherwise. This is equally true whether expressed in the statute or not, and applies to a statutory composition.[6] Executors, next-of-kin and heirs are the bankrupt, and may plead his discharge; it is waste in an administrator not to plead it.[7]

It was once intimated[8] and once decided[9] that if a creditor signed an assent to the discharge, he would release the surety; but this is a mistake, for the reason that if the surety wishes to control the debt he should pay it and prove for himself. If

[1] Long *v.* Bullard, 117 U. S. 617; see *supra*, "Secured Creditors"; Holyoke *v.* Adams, 59 N. Y. 233.

[2] Bennett *v.* Caswell, 7 Gray, 153, 155 per *Thomas, J.*; Bowman *v.* Pope, 4 George (Miss.), 94.

[3] Thal *v.* Larmon, 25 Fed. Rep. 290.

[4] Phelps *v.* Curts, 80 Ill. 109.

[5] *Supra*, § 94.

[6] Tooker *v.* Bennett, 3 Caines, 4; Shellington *v.* Howland, 53 N. Y. 371; Pratt *v.* Chase, 122 Mass. 262; Megrath *v.* Gray, L. R. 9 C. P. 216; Ellis *v.* Wilmot, L. R. 10 Ex. 10; Simpson *v.* Henning, L. R. 10 Q. B. 406; Ex parte Jacobs, L. R. 10 Ch. 211; Guild *v.* Butler, 122 Mass. 498; Moore *v.* Stanwood, 98 Ill. 605.

[7] Upshur *v.* Briscoe, 138 U. S. 365; Parker *v.* Grant, 91 N. C. 338; Blair *v.* Carter's Administrator, 78 Va. 621 (that a purchaser from a bankrupt after his bankruptcy may set up the discharge against judgment creditors claiming a lien by discharge of the judgment).

[8] Moore *v.* Paine, 12 Wend. 123.

[9] Re McDonald, 14 N. B. R. 477, Fed. Cas. No. 8753.

he fails to do this, the creditor has and ought to have full control. This also applies to a creditor assenting to a composition.[1]

We have seen that under the modern statutes sureties, indorsers, and other persons liable for the debt may prove against their principal, or oblige the creditor to prove.[2] It follows that the contingent liability of the principal debtor to the surety is discharged, whether the debt was proved or not.[3] It makes no difference that the parties have agreed that the whole benefit of the dividend shall be retained by the creditor,[4] for the law treats the entire debt as single however the parties may apportion it. The case of Soutten *v.* Soutten[5] though never expressly overruled is inconsistent with later decisions and is unsound.

§ 447. **Joint Obligations of Discharged Debtor are Discharged.** — The rule which marshals the assets of a partnership, applying the separate property to the separate debts, and *vice versa*, does not affect the proof of debts, but only the mode of liquidation. Therefore, if one partner is bankrupt, the debts which he owes jointly with his partners are provable, and he will, of course, be released from their obligation, if he obtains his certificate. The fact that there happen to be or not to be joint assets to distribute or a surplus for joint creditors is immaterial. This has always been the law of England, as clearly as the converse rule that separate debts are discharged by joint proceedings,[6] and is the foundation of many other rules, such as, that a

[1] See cases in note 6, p. 315, and Browne *v.* Carr, 2 Russ. 600; 7 Bing. 508; 5 Moo. & Pay. 497; Sigourney *v.* Williams, 1 Gray, 623.

[2] *Supra*, § 173. All the liabilities mentioned in that chapter as provable, are discharged, unless within some special exception, such as fraud in their inception, etc.

[3] Earle *v.* Oliver, 2 Ex. 71; Rolfe *v.* Caslon, 2 H. Bl. 57; Conley *v.* Dunlop, 7 T. R. 565; Buckler *v.* Buttivant, 3 East, 72; Filbey *v.* Lawford, 3 M. & G. 468; Jackson *v.* Magee, 3 Q. B. 48.

[4] Earle *v.* Oliver, 2 Ex. 71.

[5] 5 B. & Ald. 852.

[6] Ex parte Yale, 3 P. Wms. 24 note. Re Simpson, 1 Atk. 137 per *Ld. Hardwicke;* Ex parte Young, 2 Rose, 40; Grace *v.* Heyham, Fitzgibbon, 281; Thomson *v.* Harding, 3 C. B N. S. 254, per *Willes, J.;* Ex parte Hammond, L. R. 16 Eq. 614; Wickes *v.* Strahan, 2 Str. 1157; Twiss *v.* Massey, 1 Atk. 67; Deacon, Bankruptcy, 608; Robson, 7th ed. 657; Lindley, Partnership, 6th ed. 770.

plaintiff suing all the members of a firm one of whom is bankrupt may be required to stipulate not to take execution against the bankrupt if he should obtain his discharge, or, under the present practice, not to prosecute against him at all.[1] So a solvent partner is barred from recovering of the bankrupt his proportion of the joint debts, because he might have paid them and then have proved for this share.[2] Of course the debts themselves are discharged, else his right of contribution would be undoubted.

In this country opinions are not wholly agreed on this point, but the soundness of the English decisions is clear. We have already seen that the mode of settlement is the same whether one or more or all of the partners are bankrupt,[3] and it follows that the effect of the discharge must be the same. Indeed, the statutes imply this result, when they declare, as several of them do, that the discharge of one partner shall not release his co-partners. The weight of authority in this country accords with the weight of reasoning.[4] The cases and dicta opposed to this view are cited in the following note. Several of them decide that the discharge is restricted to separate debts when the bankrupt has omitted all mention of his co-partnership debts in his schedule, from which the courts have inferred that he did not seek a discharge from them.[5] Such an omission, if fraudulent, would be a reason for annulling the discharge, but not for limiting its true scope, unless the statute provides that omitted creditors are not affected by the proceedings.[6] No one

[1] Lindley, Partnership, 6th ed., p. 299.

[2] Aflalo *v.* Fourdrinier, 6 Bing. 306; Wood *v.* Dodgson, 2 M. & S. 195.

[3] *Supra*, § 128.

[4] Willson *v.* Gompartz, 11 Johns. 193; Butcher *v.* Forman, 6 Hill, 583; Tucker *v.* Oxley, 5 Cranch, 34, 40, per *Marshall, C. J.*; Rice Appt. 7 Allen, 112 (surviving partner); Barclay *v.* Phelps, 4 Met. 397; Lothrop *v.* Tilden, 8 Cush. 375; Morrison *v.* Woolson, 23 N. H. 11; Buckner *v.* Calcote, 28 Miss. 432; Re Stevens, 1 Sawyer, 397, Fed. Cas. No. 13,393; Wilkins *v.* Davis, 2 Lowell, 511, Fed. Cas. No. 17,664; Re Brick, 4 Fed. Rep. 804; Re Leland, 5 N. B. R. 222, Fed. Cas. No. 8228; West Phila. Bank *v.* Gerry, 106 N. Y. 467; Rand *v.* King, 156 Mass. 515; Re Abbe, 2 N. B. R. 75, Fed. Cas. No. 4.

[5] Hudgins *v.* Lane, 11 N. B. R. 462, Fed. Cas. No. 6827; Re Plumb, 9 Ben. 279, Fed. Cas. No. 11,231; Corey *v.* Perry, 67 Maine, 140; Glenn *v.* Arnold, 56 Cal. 631, on the construction of the insolvent law of California; Re Little, 1 N. B. R., 341, Fed. Cas. No. 8390; Poillon *v.* Lawrence, 77 N. Y. 207 *semble*.

[6] See § 459.

can be a bankrupt in part. If it should clearly and unequivocally appear that he asks for a discharge from only one class of debts (a very improbable contingency), he might be estopped as to others.

§ 448. **Discharge from one Class of Debts.** — The statute may authorize the courts to grant a discharge from one set of debts and not the other, as where an offer of composition is made to and accepted by one class exclusively.[1] So when an assent of creditors was required, or in the alternative the payment of fifty per cent in dividends, it was held that such a payment upon the separate debts would authorize the court to grant a discharge of those debts.[2] In neither of these classes of cases does the decision depend upon the bankruptcy being joint or several. In the cases cited it was joint.

§ 449. **Bond to Dissolve Attachment.** — When property is attached on *mesne process* and a bond is given by the defendant, with sureties, to dissolve it, the condition is to pay the judgment. If the debt is one dischargeable by a decree in bankruptcy and the defendant obtains and pleads his discharge pending the action, no judgment can, in ordinary cases, be recovered and there is no breach of the bond.[3] It has been held, however, by some courts that if the attachment by reason of the time which had elapsed before the bankruptcy or for some other reason would not have been dissolved by the assignment, the court in which the action is pending may render a special judgment to bind the sureties, in order that the plaintiff may have the same benefit by his bond which he would have had by his attachment.[4] In Massachusetts a statute was found needful to effect this result.[5]

[1] Ebbs *v.* Boulnois, L. R. 10 Ch. 479; Meggy *v.* Imp. Disc. Co. 38 L. T. N. S. 309.

[2] Baker's Case, 8 Cush. 109; Morrison *v.* Woolson, 23 N. H. 11, per *Perley, J.*

[3] Loring *v.* Eager, 3 Cush. 188; Carpenter *v.* Turrell, 100 Mass. 450.

[4] Holyoke *v.* Adams, 59 N. Y. 233; Re Albrecht, 17 N. B. R. 287, Fed. Cas. No. 145; Zollar *v.* Janvrin, 49 N. H. 114. See *supra*, § 339.

[5] Stat. 1875, ch. 68. Before the statute, Carpenter *v.* Turrell, 100 Mass. 450; Hamilton *v.* Bryant, 114 Mass. 543; Braley *v.* Boomer, 116 Mass. 527; Johnson *v.* Collins, 117 Mass. 343. Since the statute, Barnstable Sav. Bank *v.* Higgins, 124 Mass. 115; Denny *v.* Merrifield, 128 Mass. 228; Sullivan *v.* Langley, 128 Mass. 235; O'Neil *v.* Harrington, 129 Mass. 591; Sullings *v.* Ginn, 131 Mass. 479; Bernheimer *v.* Charak, 170 Mass. 179.

It is sometimes held that the release of the attachment is the consideration for the undertaking of the sureties and that the courts will permit a judgment to be obtained in order to charge them, though proceedings are pending and were begun within four months after the attachment.[1]

Where the undertaking of the surety is merely to return attached property to the sheriff, a dissolution of the attachment relieves him.[2] But where a question of title was involved and the sureties undertook absolutely to return property replevied, it was held that a discharge of the principal did not release the sureties.[3]

§ 450. **Recognizance under Poor Debtor Law.** — In Massachusetts a defendant taken in execution gives a recognizance conditioned that he will, within ninety days, apply to take the oath for the relief of poor debtors. Such a defendant went into insolvency under the insolvent law of Massachusetts on the ninetieth day after giving his recognizance, and it was held that there was no provable debt against him on his recognizance, because the breach did not occur until the ninety-first day, and therefore that his discharge would not avail either him or his surety.[4] In the same State it is held that bankruptcy and an assignment under it will not relieve the obligation to appear and take the oath.[5]

In Pennsylvania, on the other hand, where the condition of the bond is to surrender or apply for the benefit of the insolvent law of the State, an application for the benefit of the bankrupt law of the United States is a substantial compliance with the condition.[6]

In New York an imprisoned debtor must apply to the proper court and annex a schedule of his property. It is not a compliance with this law to aver that he is a bankrupt and that his assignee has been duly appointed.[7]

§ 451. **Judgments obtained pending Proceedings.** — In England bankruptcy was not a good plea, and the courts would

[1] McCombs *v.* Allen, 82 N. Y. 114.
[2] Payson *v.* Payson, 1 Mass. 283.
[3] Wolf *v.* Stix, 99 U. S. 1.
[4] Smith *v.* Randall, 1 Allen, 456.
[5] On this subject, see Grinnell, Poor Debtor Law of Massachusetts.
[6] Barber *v.* Rogers, 71 Penn. St. 362; Hubert *v.* Horter, 81 Penn. St. 39.
[7] Ballymore *v.* Cooper, 46 N. Y. 236.

not continue an action to await the debtor's discharge. Each party was left to pursue his remedies in his own way;[1] but if a creditor obtained judgment on a provable debt pending the proceedings, he was bound by the discharge and it was early enacted that if he took the defendant in execution under such circumstance, the court would discharge him out of custody upon summary application.[2] The bankrupt's after-acquired goods might be discharged in a similar way.[2]

This practice was followed in New York under an insolvent law resembling the bankrupt acts in the circumstance that no opportunity was given the insolvent to stay proceedings in an action pending the question of his discharge.[3] The creditor must be permitted in these proceedings or in a later action to prove that his debt is not covered by the certificate, as, for example, that it was fraudulently incurred.[4]

In Massachusetts it was the practice to grant a continuance for a reasonable time of actions on provable debts to enable a defendant who was going through the court of insolvency or bankruptcy to obtain his discharge and plead it in an action then pending.[5] If he neglected to avail himself of this opportunity he was held bound by a judgment obtained after the proceedings were begun, but before the discharge was granted.[6] If a motion for continuance was overlooked and judgment obtained review would lie.[7]

The Act of Congress of 1867 adopted the practice of Massachusetts by requiring suits to be stayed for a reasonable time to await the action of the court of bankruptcy on the question of discharge.[8] It naturally followed that many courts adopted

[1] Re Gallison, 2 Lowell, 72, 74, Fed. Cas. No. 5203.

[2] Bouteflour *v.* Coates, Cowp. 25; Blandford *v.* Froud, ib. 138; Scott *v.* Ambrose, 3 M. & S. 326; Willett *v.* Pringle, 2 B. & P. N. R. 190; and cases cited in the argument of Boynton *v.* Ball, 121 U. S. 457.

[3] Monroe *v.* Upton, 50 N. Y. 593, and cases cited.

[4] Lister *v.* Mundell, 1 B. & P. 427; Yeo *v.* Allen, 3 Doug. 214; Linn *v.* Hamilton, 34 N. J. Law, 305.

[5] Barker *v.* Haskell, 9 Cush. 218; Lummus *v.* Fairfield, 5 Mass. 248.

[6] Sampson *v.* Clark, 2 Cush. 173; Woodbury *v.* Perkins, 5 Cush. 86; Wolcott *v.* Hodge, 15 Gray, 547.

[7] Todd *v.* Earton, 117 Mass. 291; Golden *v.* Blaskopf, 126 Mass. 523. This was mandatory. Page *v.* Cole, 123 Mass. 93; Seavey *v.* Beckler, 128 Mass. 471.

[8] § 21, 14 Stats. 526, Rev. Stats. § 5106.

the rule in Massachusetts, that the bankrupt must take the trouble to plead his bankruptcy and procure a stay until he could plead his discharge.[1] This rule is logically sound, not so much because the debt is merged in the judgment as because the defendant, having had an opportunity to plead his defence, should be held bound by his neglect to do so. It had, however, the inconvenience that bankrupts will not in practice take this trouble, and judgments were often obtained by mere routine when neither party perhaps desired it. The Supreme Court, disregarding logic, held such a judgment to be barred,[2] overruling the cases cited in note 1.

§ 452. **Discharge must be Pleaded.** — There is no doubt that when the discharge is obtained before judgment, it must be pleaded *puis darrein continuance*.[3] This plea is admitted as of right;[4] and it follows that if it is neglected, no relief can be had either at law or in equity against the judgment,[5] unless there has been an accident or mistake justly relievable, in which case the court itself in which the judgment was obtained has usually full power of review. If it has not, equity will relieve.[6]

If the discharge is obtained pending an appeal from a judgment for a provable debt in a lower court, the higher court will usually admit the plea or require it to be admitted by the lower court. If not, equity may grant relief.[7]

[1] See Holbrook *v.* Foss, 27 Maine, 441; Bowen *v.* Eichel, 91 Ind. 22; Bradford *v.* Rice, 102 Mass. 472; Boynton *v.* Ball, 105 Ill. 627; Wise's Appeal, 99 Penn. St. 193; McCarthy *v.* Goodwin, 8 Mo. App. 380; Steadman *v.* Lee, 61 Georgia, 58.

[2] Boynton *v.* Ball, 121 U. S. 457; McDonald *v.* Davis, 105 N. Y. 508. See Re Pinkel, 1 N. B. N. 138.

[3] Todd *v.* Maxfield, 6 B. & C. 105; Rossi *v.* Bailey, L. R. 3 Q. B. 621; Dimock *v.* Revere Copper Co., 90 N. Y. 33, affirmed 117 U. S. 559; Hollister *v.* Abbott, 31 N. H. 442; Desobry *v.* Morange, 18 John. 336; Hellman *v.* Licher, 9 Abb. Pr. N. s. 288; Miller *v.* Clements, 54 Tex. 351.

[4] Paris *v.* Salkeld, 2 Wils. 137.

[5] See note 3, and Cutter *v.* Evans, 115 Mass. 27; Re Tooker, 14 N. B. R. 35, Fed. Cas. No. 14,096; Mechanics Bank *v.* Hazard, 9 Johns. 392; Steward *v.* Green, 11 Paige, 535; Merchants' Bank *v.* Moore, 2 Johns. 294; Cable *v.* Cooper, 15 Johns. 152; Post *v.* Riley, 18 Johns. 54; Bellamy *v.* Woodson, 4 Ga. 175; Bank of Missouri *v.* Franciscus, 15 Mo. 303; Marsh *v.* Mandeville, 6 Cush. (Miss.) 122; Rudge *v.* Rundle, 1 Sup. Ct. N. Y. (T. & C.) 649.

[6] Shurtleff *v.* Thompson, 63 Maine, 119; Hadley *v.* Boehm, 1 Hun, 304; Revere Copper Co. *v.* Dimock, 90 N. Y. 33; Golden *v.* Blaskopf, 126 Mass. 523.

[7] Minot *v.* Brickett, 8 Met. 560; Exchange Bank *v.* Knox, 19 Gratt. 739; Labron *v.* Woram, 5 Hill, 373.

Whether a defendant has had opportunity to plead his discharge depends on the situation of the cause and the practice of the court; part of a day has been held insufficient and several days or even a clear court day sufficient.[1]

§ 453. **Summary Discharge or Stay of Executions.** — We have already seen that after a bankrupt had been discharged the court in which a judgment had been recovered would discharge him out of custody upon summary petition pending the bankruptcy, and relieve his property from seizure.[2] A like practice prevails as to all judgments which are barred by the discharge, such as those recovered before the bankruptcy.[3] That such an order was made without notice to the creditor does not render it void, and the sheriff is exonerated by it.[4] It is likewise the practice to exonerate bail in a summary way.[5] Orders of this sort do not avoid the judgment, which may still be the foundation of an action, if the judgment creditor is advised that he can successfully dispute the bankrupt's certificate.

Sheriffs and other officers acting under precepts apparently valid are not liable in tort for arresting a discharged bankrupt; the remedy is against the judgment creditor or other principal.[6] In Massachusetts the remedy for the improvident issue of execution is by *audita querela*.[7]

§ 454. **Mode of Pleading Discharge.** — At the present time a discharge in bankruptcy may be pleaded in a very simple and direct mode, stating merely that the defendant became bank-

[1] Baker *v.* Judges of Ulster, 4 Johns. 191; Palmer *v.* Hutchins, 1 Cow. 42; Baker *v.* Taylor, ib. 165; Hanson *v.* Blakey, 4 Bing. 493; Braun *v.* Weller, L. R. 2 Ex. 183; Revere Copper Co. *v.* Dimock, 90 N. Y. 33, affirmed 117 U. S. 559.

[2] *Supra*, § 451.

[3] Graham *v.* Peirson, 6 Hill, 247; Pinckney *v.* Hegeman, 53 N. Y. 31; Cornell *v.* Dakin, 38 N. Y. 253; Palmer *v.* Hussey, 87 N. Y. 303; Williams *v.* Humphreys, 50 N. J. Law, 500; Francis *v.* Ogden, 22 N. J. Law, 210; Curtis *v.* Slosson, 6 Penn. St. 265.

[4] Reed *v.* Gordon, 1 Cow. 50; Cunningham *v.* Brown, 5 Cow. 289.

[5] Geikie *v.* Hewson, 4 M. & G. 618; Woolley *v.* Cobbe, 1 Burr. 244; Mannin *v.* Partridge, 14 East, 599; McCausland *v.* Waller, 1 Har. & J. 156; Comm. *v.* Huber, 5 Pa. L. J. 331; Nettleton *v.* Billings, 17 N. H. 453; Seaman *v.* Drake, 1 Caines, 9; Long *v.* Dickerson, 15 Blatch. 459, Fed. Cas. No. 8480.

[6] Aldrich *v.* Aldrich, 8 Met. 102.

[7] Foss *v.* Witham, 9 Allen, 572.

rupt at such a time and in such a court, and obtained his certificate. Of course, as error in the proceedings cannot be shown, it is impertinent for either party to plead it. Whether the facts to establish jurisdiction must be pleaded by the defendant is not entirely settled; the better opinion is that the want of jurisdiction, when admissible at all, is matter of defence.[1] If the statute prescribes a mode of pleading, it should be followed.[2]

If the discharge is obtained too late to be pleaded, as for example after a default, or if through accident or misunderstanding the time has gone by, the court may in its discretion open the case.[3] If it should refuse, or even if the defendant should not apply for this indulgence, his rights, in a suit on the judgment, would not be affected.

§ 455. **Pleading Discharge** (*continued*). — By the practice in many States if a defendant obtains and pleads his discharge pending an action, the plaintiff may discontinue or submit to a verdict without costs.[4] It follows that if the defendant refuses to rely wholly upon his discharge he cannot rely upon it at all, in other words, he cannot plead double in such case, because he puts the plaintiff at a disadvantage. If, therefore, the defendant insists upon a trial upon the merits of his original case, he may be required to waive the discharge.[5] A court of appeals will usually permit a discharge obtained pending the appeal to be pleaded.[6] In strict pleading a discharge obtained pending an action, should be pleaded at the next term;[7] and

[1] See Rev. Stats. (U. S.) § 5119; English Bankruptcy Act, 1883, § 30, cl. 3; Whitney *v.* Rhoades, 3 Allen, 471; Symonds *v.* Barnes, 59 Maine, 191; Stephens *v.* Ely, 6 Hill, 607; Reed *v.* Vaughan, 15 Mo. 137; Jones *v.* Russell, 44 Ga. 460; Heffren *v.* Jayne, 39 Ind. 46; McMinn *v.* Allen, 67 N. C. 131; White *v.* How, 3 McLean, 291, Fed. Cas. No. 17,549; Lathrop *v.* Stuart, 5 McLean, 167, Fed. Cas. No. 8113; Rowan *v.* Holcomb, 16 Ohio, 463; Parker *v.* Atwood, 52 N. H. 181; McCormick *v.* Pickering, 4 N. Y. 276; Viele *v.* Blanchard, 4 G. Greene, 299; Price *v.* Bray, 1 Zab. 13

[2] Stoll *v.* Wilson, 38 N. J. Law, 198.

[3] Bank *v.* Webster, 48 N. H. 21; Golden *v.* Blaskopf, 126 Mass. 523; Lee *v.* Phillips, 6 Hill, 246; Shurtleff *v.* Thompson, 63 Maine, 118.

[4] Park *v.* Moore, 4 Hill, 592; Hart *v.* Storey, 1 Johns. 143; Honeywell *v.* Burns, 8 Cow. 121; Sandford *v.* Sinclair, 6 Hill, 248.

[5] Goward *v.* Dunbar, 4 Cush. 500.

[6] Lewis *v.* Shattuck, 4 Gray, 572; Morris *v.* Briggs, 3 Cush. 342; Glazier *v.* Carpenter, 16 Gray, 385; Bank of Bellows Falls *v.* Onion, 16 Vt. 470.

[7] Desobry *v.* Morange, 18 Johns. 336.

waives the earlier pleas;[1] and though this practice is now much relaxed, the courts will refuse to admit the plea after a long delay, or if it is inequitable.[2]

A case was tried on its merits in a State court and the plaintiff obtained judgment; upon error the Supreme Court affirmed the rulings below and sent a mandate accordingly. In the meantime the defendant obtained a discharge in bankruptcy. It was held that he could not resist an entry of judgment, but it was intimated that he might have a remedy by *audita querela*.[3]

§ 456. **Second Bankruptcy.** — If one who has become bankrupt and has been refused his discharge becomes bankrupt a second time, and obtains a discharge the debts which might have been proved in the former proceedings will not be discharged, because as to them it is *res judicata* that the debtor was not entitled to this relief. This exemption is waived by the creditor, if he proves in the second proceedings.[4]

In the United States, the statutes usually provide that in a second bankruptcy there shall be no discharge unless a certain large dividend is paid, or all the old debts have been settled.[5] In the latest English law, there can be no discharge of one who has before been bankrupt or has made a composition.[6]

§ 457. **Corporations.** — The statutes do not grant a discharge to corporations which are made bankrupt, and judgments may be recovered against them, notwithstanding their bankruptcy, if necessary to charge directors or shareholders or for any other purpose.[7]

[1] Wheelock *v.* Rice, 1 Doug. 267.

[2] Medbury *v.* Swan, 46 N. Y. 200; Barstow *v.* Hansen, 4 Sup. Ct. N. Y. (T. & C.) 569, 2 Hun, 333; Holyoke *v.* Adams, 59 N. Y. 233; Sandford *v.* Sinclair, 3 Denio, 269. But if there are no equities, delay is not fatal. Falkner *v.* Hunt, 76 N. C. 202; Banque Franco-Egypte. *v.* Brown, 24 Fed. Rep. 106.

[3] Goodrich *v.* Wilson, 135 Mass. 31.

[4] Gilbert *v.* Hebard, 8 Met. 129; Gardner *v.* Way, 8 Gray, 189; Whitney *v.* Willard, 13 Gray, 203.

[5] A discharge under the Act of Congress is not a payment within the meaning of such a statnte. Whitney *v.* Weed, 156 Mass. 224.

[6] B. A. 1890, § 8.

[7] Athol Nat. Bank *v.* Hingham Mfg. Co., 121 Mass. 399. [Under the Act of 1898 corporations are not expressly disqualified from receiving a discharge. See *infra*, § 477.]

§ 458. **All Rights against Sureties and other Persons liable for Bankrupts' Debts are Preserved.** — It is a fundamental and universal rule that the discharge in bankruptcy is personal to the bankrupt, and does not release any mortgage, pledge, or lien upon his property,[1] nor any person who is liable for or with him to pay the same debt as copartner, surety, or otherwise howsoever. The reservation is often made in the statute, but this is unnecessary, for it will be taken for granted, and will be applied to a discharge by a statutory composition.[2]

It was once intimated by a very able judge that a consent by the creditor to the debtor's discharge might operate to discharge sureties ;[3] and there has been one decision to this effect,[4] but the law is otherwise. The surety may pay the debt and prove it, and if he choose not to do so, the proving creditor not only may assent, but is morally bound to assent, if he finds it to be just that the debtor should be discharged; and if he do so, though contrary to an express notice by the surety, the latter will not be released.[5]

In some cases it may be the creditor's duty to prove the debt, if the surety has not an equal opportunity to do so, and he may under such circumstances be bound to give credit for any dividend which the estate of the principal would have paid.[6]

§ 459. **Creditors not Notified.** — Unless there is an exception in the statute, the debts of creditors who have had no notice of the proceedings are barred, even though the omission were fraudulent on the part of the bankrupt.[7] The courts are

[1] *Ante*, § 446.

[2] Tooker *v.* Bennett, 3 Caines, 4; Megrath *v.* Gray, L. R. 9 C. P. 216; Ellis *v.* Wilmot, L. R. 10 Ex. 10; Simpson *v.* Henning, L. R. 10 Q. B. 406; Ex parte Jacobs, L. R. 10 Ch. 211; Guild *v.* Butler, 122 Mass. 498; Moore *v.* Stanwood, 98 Ill. 605.

[3] Moore *v.* Paine, 12 Wend. 123.

[4] Re McDonald, 14 N. B. R. 477, Fed. Cas. No. 8753.

[5] Browne *v.* Carr, 2 Russ. 600; 7 Bing. 508, 5 Moore & P. 497; Sigourney *v.* Williams, 1 Gray, 623; Megrath *v.* Gray, L. R. 9 C. P. 216; Ellis *v.* Wilmot, L. R. 10 Ex. 10; Ex parte Jacobs, L. R. 10 Ch. 211; Guild *v.* Butler, 122 Mass. 498.

[6] See Am. Bank *v.* Baker, 4 Met. 164.

[7] Parbury's Case, 3 De G. F. & J. 80; Heather *v.* Webb, 2 C. P. D. 1; Burpee *v.* Sparhawk, 108 Mass. 111; Black *v.* Blazo, 117 Mass. 17; Burnside *v.* Brigham, 8 Met. 75; Hubbell *v.* Cramp, 11 Paige, 310; Fox *v.* Paine, 10 Ala. 523; Loud *v.* Pierce, 25 Maine, 233; Crooker

not entirely agreed, especially on the latter part of the proposition, but I consider it the better opinion. In the insolvent debtor's acts of England, (when there were such), and in the composition acts, this rule is modified.

§ 460. **Consent of Creditors.** — Creditors have so great an interest in the question of discharge, that many statutes require the assent in writing of a certain proportion of them to its being granted, however fair and honest the conduct of the debtor may have been. The objections to this rule are that some creditors may be bribed to give their assent — a fact difficult of proof — and the right of the creditors being absolute may be exercised from unworthy motives. The necessity for consent is omitted from the latest statute in England, and in some of the states.[1] In one or two statutes, now repealed, a certain proportion of creditors must dissent to prevent a discharge.

The creditors who are to be counted in ascertaining whether the consent is sufficient are those who have proved their debts in the proceedings.

§ 461. **Acts and Omissions which Prevent Discharge.** — The consent of creditors, when required, is only one condition necessary to the discharge. This privilege is intended for honest and even careful debtors, and frauds, or certain omissions, if proved to the satisfaction of the court or jury (where that form of trial is provided for), will prevent the discharge.

Though the statutes vary somewhat, it may be said in general that frauds at common law, preferences contrary to the act, misdemeanors under the act, if there be such, or any failure or refusal to comply with the orders of the court, or to

v. Trevett, 28 Maine, 271; Carey *v.* Esty, 29 Maine, 154; Hurd *v.* Indiana Mut. Ins. Co., 1 Ind. 162; Rogers *v.* Western Ins. Co., 1 La. Ann. 161; Knabe *v.* Hayes, 71 N. C. 109; Thornton *v.* Hogan, 63 Mo. 143; Rayl *v.* Lapham, 27 Ohio St. 452; Pattison *v.* Wilbur, 10 R. I. 448; Viele *v.* Blanchard, 4 G. Greene (Iowa), 299; Shelton *v.* Pease, 10 Mo. 473. See *contra* Batchelder *v.* Low, 43 Vt. 662; Downer *v.* Dana, 22 Vt. 337; Steele *v.* Towne, 28 Vt. 771; Re Pearce, 21 Vt. 611; Morse *v.* Presby, 25 N. H. 299; Brown *v.* Rebb, 1 Rich. 374. [The Act of 1898 provides that the debt of a creditor who has no notice of the bankruptcy proceedings shall not be barred. See *infra*, § 480.]

[1] [There is no such requirement in the Act of 1898.]

conform to the law, or to deliver to his assignees all his assets are sufficient reasons for refusing the certificate.[1] The most usual omission which is made a bar is the failure by merchants and traders to keep proper books of account.[2]

The latest English law, more stringent than its predecessors, adds several acts, such as that the bankrupt has contracted provable debts without reasonable or probable ground of expectation of being able to pay them; rash and hazardous speculations and extravagance in living causing his bankruptcy; that he has continued his trade after knowing himself to be insolvent.[3]

§ 462. **Who may Oppose.** — It is no part of the duty of assignees to oppose the discharge, but any creditor whose claim has been proved may do so; and by some statutes expressly, and by the better practice generally, any creditor whose debt will be barred may object upon showing that he has a provable claim, though he may not have found it expedient to ask for a dividend. In such case the creditor is to be considered as having submitted to the jurisdiction, if that point should be of importance.[4]

It is hardly necessary to say that proof of a debt does not estop the proving creditor from disputing the discharge in any court upon any ground upon which it is by law disputable, except want of jurisdiction of the creditor in respect of the debt proved, and that not proving gives no advantage in such dispute.[5]

§ 463. **Form of Discharge.** — The form of the discharge (or certificate of the fact of discharge) is often given in the statute.

[1] [As to the acts which prevent a discharge under the Act of 1898, see *infra*, § 477.]

[2] [The Act of 1898 contains no such disqualification.]

[3] B. A. 1890, § 8.

[4] In re Shepard, 1 N. B. R. 439, Fed. Cas. No. 12,753; In re Smith, 8 Blatch. 461, Fed. Cas. No. 12,977; In re Murdock, 3 N. B. R. 146, Fed. Cas. No. 9939; Re Boutelle, 2 N. B. R. 129 Fed. Cas. No. 1705; In re Book, 3 McLean, 317, Fed. Cas. No. 1637. *Contra*: In re Levy, 1 N. B. R. 327, Fed. Cas. No. 8297; In re Hill, 1 N. B. R. 16, Fed. Cas. No. 6481; In re Burk, 3 N. B. R. 296, Fed. Cas. No. 2156; In re Palmer, 3 N. B. R. 301, Fed. Cas. No. 10,682; In re King, Fed. Cas. No. 7784.

[5] Morse *v.* Reed, 13 Met. 62; Williams *v.* Coggeshall, 8 Cush. 377; Wetherbee *v.* Martin, 16 Gray, 518.

This form may be varied to meet particular cases, as where one who had been an insolvent debtor and became bankrupt could only be discharged as to his person and not as to his future property, or where only the separate debts of a partner were held to be discharged, certificates were ordered to be issued in conformity with the facts.[1]

[1] Ex parte Green, 1 Atk. 257; *v.* Boulnois, L. R. 10 Ch. 479; Meggy Baker's Case, 8 Cush. 109. See Ebbs *v.* Imp. Disc. Co. 3 Q. B. D. 711.

PART II.

THE BANKRUPTCY ACT OF 1898.

CHAPTER I.

DEFINITIONS.

§ 464. **Act of 1898.** — SEC. 1. MEANING OF WORDS AND PHRASES. — *a.* The words and phrases used in this Act, and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private

corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) "creditor" shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are expected by this act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors,

shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case, or to whom the case has been referred, or any one acting in his stead: (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of

or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

The definitions are important, because it will be found that when taken in connection with the later sections of the act to which they severally apply they have affected the law of bankruptcy in many particulars.

The definition of adjudication has a controlling effect on the question of the trustee's title which will be treated of in § 532.

The respective duties of the judge and referee, who are both included in the "court," are indicated partly by later sections of the act and partly by the rules of the Supreme Court. The Forms also show certain cases where the Supreme Court has pointed out their duties. See § 500.

The question may arise, Who is a duly authorized agent, attorney, or proxy under clause 9? Forms 20 and 21 show two kinds of letter of attorney to one not an attorney-at-law to represent a creditor in matters relating to bankruptcy. Form 20 gives power to represent the creditor generally in all proceedings in bankruptcy, while Form 21 gives power to represent the creditor only at the first meeting and in the choice of trustee. These forms are expressly restricted to persons who are not attorneys-at-law, and there is no form for a power to an attorney-at-law. It was evidently the intention of the Supreme Court that it should not be necessary for an attorney-

at-law to have a written power of attorney. This conclusion is emphasized by the fact that Form 26 under the act of 1867, from which the present Form 20 was taken, applied to attorneys-at-law as well as attorneys-in-fact.[1] This is an important matter, since a stamp is required under the Revenue Act on all powers of attorney.[2] Creditors may be represented by an attorney-at-law without being subject to the tax, but must pay twenty-five cents for the privilege of employing an attorney-in-fact. The power of attorney must be executed before a referee, United States commissioner, or notary public,[3] or a United States consul abroad.[4]

The Forms provide for an acknowledgment of the letter of attorney, and this should be procured if possible; but as there is no requirement of this sort in the act of 1898 itself, or in the rules of the Supreme Court, it would seem that an unacknowledged power of attorney would be valid.[5] An omission of it would save the revenue tax of ten cents.

Rule IV. has prescribed that a creditor may appear before the court of bankruptcy and conduct his case, but he can represent only his own interest. The rule also deals with the question of the authority of attorneys-at-law to represent creditors in court. There seems to be a discrepancy between this rule and Form 20, which authorizes an attorney-in-fact to appear in court. Perhaps a way to reconcile the two provisions may be to say that an attorney-in-fact may attend to all routine matters which do not require the services of a person having a knowledge of law, while all matters involving such knowledge must be entrusted to attorneys authorized to practise in the circuit or district court.[6] In case of a conflict between the Rule and the Form, the provisions of the Rule must prevail.

"Debt" is used as a synonymous term with demand and claim. This has a bearing on the question of what debts are provable against the bankrupt's estate, and will be considered in connection with § 525.

[1] Bump, Bankruptcy, 10th ed. 930.
[2] Gould & Savary, War Revenue Law of 1898, 66.
[3] Rule XXI. 5.
[4] Re Sugenheimer, 91 Fed. Rep. 744, 1 N. B. N. 59.
[5] Re Barnes, 1 Lowell, 560, Fed. Cas. No. 1012.
[6] Rule IV.

Clause 15 has made a great change in the definition of insolvency when applied to a bankrupt trader. It used to mean an inability to pay debts as they accrued in the course of business.[1] It has now the meaning which has sometimes been applied in the case of a non-trader,[2] or of a trader under the insolvent laws of some of the States.[2] The obvious result of this change is, that a person who owns real estate will not be found insolvent if the land, at a fair valuation, will pay his debts. We are not told how the valuation shall be made, and if a business is not to be valued as a continuing one, but the aggregate of the property is to be appraised as if the bankrupt's affairs were being wound up, the sum total will be much less. So that the result of such a rule would be, that many persons who do not own real estate will be insolvent who were not so under the former definition.

The chief difficulty with the rule, however construed, will be found in its working. Under the old law, fellow-traders with a bankrupt could easily find out whether he was paying his debts as they matured. Under this act, it will often be a matter of some trouble to discover what the property of a person, including his real estate, is worth.

As to what persons are subject to bankruptcy proceedings, see *supra*, §§ 15 *et seq.*, and *infra*, § 467.

The word "conceal" is given an extended meaning which will enlarge the scope of the first act of bankruptcy mentioned in § 3 of the act, and the offence contained in § 29 of the act. See §§ 466, 491.

The definition of a secured creditor raises some points which will be considered in § 519.

The extended meaning of "transfer" will affect the second act of bankruptcy prescribed by § 3 of the act. See § 466.

[1] See § 41.

[2] See Re Scott (1896), 1 Q. B. 619; Toof v. Martin, 13 Wall. 40, 47; Re Bennett, 2 Lowell, 400, Fed. Cas. No. 1314; Adler Clothing Co. v. Hellman, 75 N. W. Rep. (Neb.) 877; Sabin v. Columbia Fuel Co., 25 Ore. 15; Mueller v. Fire Clay Co., 183 Pa. St. 450.

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

§ 465. **Act of 1898.** — SEC. 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations, for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to

discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and (19) transfer cases to other courts of bankruptcy.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

Under the act of 1867 which contained the word "residing"[1] there was a decision that the debtor's residence was where he did business, though his family lived elsewhere and he lived with them a part of the time.[2] Under the present act a person who resides in one district and has his principal place of business in another may file his petition or be proceeded against in either place. If he does business in two dis-

[1] Act of 1867, § 11, 14 Stats. 521, R. S. § 5014.

[2] Re Watson, 4 N. B. R. 613, Fed. Cas. No. 17,272.

tricts the petition must be filed where his principal place of business is. Residence and domicile are equivalent expressions probably.[1]

The provision that the court shall have jurisdiction where the debtor has been for the next preceding six months or the greater portion thereof is substantially the same as the corresponding provision of the law of 1867, under which it was held that the debtor need not have resided within the United States for six months, but that he should apply in the district where he had been longest.[2]

There is a new provision in this clause giving the court power over bankrupts who have no residence or place of business within the United States but have property here. This would apply to aliens. They were held subject to bankruptcy proceedings under English laws.[3] The terms of the provision are broad enough to cover aliens who had never been in the United States but it is contrary to principles of international law to declare such persons bankrupt.[4] If the alien had been within the United States and committed an act of bankruptcy there the case would be different,[5] because the United States may make such laws as it pleases for any person subject to its jurisdiction.[6] But if the act of bankruptcy were committed elsewhere, the fact that at some previous time he had been in the United States would make no difference, as he was not subject to the jurisdiction when he committed the act.

Under the bankrupt laws of 1841 and 1867, a person might file a petition to be declared a bankrupt where he resided or had a place of business. It was held that he must have a fixed place of business and it was not enough to show merely that he was engaged in business.[7] It was no objection, however, that the bankrupt was acting as agent.[8]

[1] *Supra*, § 26.

[2] *Supra*, § 26. See Re Marine Machine Co., 91 Fed. Rep. 630, 1 N. B. N. 135.

[3] *Supra*, § 20.

[4] Ex parte Blain, 12 Ch. D. 522.

[5] Per *James, L. J.*, 12 Ch. D. 527.

[6] Moore's Dicey on the Conflict of Laws, pp. 285 *et seq.*

[7] Re Kinsman, Fed. Cas. No. 7832; Re Little, 3 Ben. 25, Fed. Cas. No. 8391; Re Magie, 2 Ben. 369, Fed. Cas. No. 8951.

[8] Re Baily, 1 N. B. R. 613, Fed. Cas. No. 753; Re Belcher, 1 N. B. R. 666, Fed. Cas. No. 1237.

The courts are given power to adjudge persons bankrupt who have been declared so abroad. This is a new provision which was probably inserted to enable the court to act in aid of foreign bankruptcies. The rights of creditors who have proved in the foreign bankruptcy is regulated by § 65 of the act.

The subject of reconsidering claims which have been allowed is contained in § 57 *k* of the act. The method of procedure is laid down by Rule XXI. (6). See *infra*, § 519.

Clause 3 gives the court power to appoint a receiver or a marshal to take charge of the bankrupt's property before the trustee is qualified.[1] This covers different ground than do § 3 *e* and § 69. The former section relates to an application by a petitioning creditor to hold the property until the petition is heard. The latter has a similar object in view. In neither case has the court power over the property after the hearing of the petition and in both cases the petitioner must file a bond. Under the clause we are now considering the court may act on the application of any party in interest without requiring a bond and the property may be held after the debtor is adjudged a bankrupt until the trustee is qualified. The fact that no bond is required suggests a way in which an enterprising petitioning creditor by an arrangement with another creditor not a petitioner may have the bankrupt's property taken possession of by order of the court without the necessity of giving a bond. It has been held that the court may appoint a receiver on its own motion,[2] but this may be doubted, as the terms of clause 3 seem to require an application.[3]

The act of May 28, 1896, c. 252, § 20[4] forbade the appointment as a receiver of the marshal or any of the other federal officers therein enumerated. It may be a question how far this law has been changed by clauses 3 and 5. It seems to have been assumed by Judge Speer in the United States District Court for Georgia that a marshal could not be appointed a

[1] See Re Gutwillig, 90 Fed. Rep. 475, ib. 481, affirmed 92 Fed. Rep. 337; Re Abrahamson, 1 N. B. N. 23; Rautman *v.* Hopkins, 1 N. B. N. 41; Re Etheridge Furniture Co., 92 Fed. Rep. 329.

[2] Re Abrahamson, 1 N. B. N. 23.

[3] See Re Gutwillig, 90 Fed. Rep. 475, ib. 481, affirmed 92 Fed. Rep. 337.

[4] 29 Stats. 184.

receiver.[1] The act of 1896 would certainly not prevent a marshal's taking possession of the estate and since by clause 5 the court is expressly given power to appoint a marshal to carry on the bankrupt's business for a limited time, it would seem the intention of Congress to modify the act of 1896 as far as it applied to marshals. The other federal officers mentioned in that act are undoubtedly disqualified from acting as receivers.

The circuit courts are given concurrent jurisdiction of offences.[2]

Clause 7 gives the district court power over controversies between trustees and adverse claimants in certain cases.[3] Such controversies can only be determined by a regular suit and can not be settled by summary proceeding.[4]

Under clause 13 the court would have power to enforce all orders necessary to the administration of the affairs of the bankrupt, — as for instance an order to the bankrupt to give possession of real estate to a purchaser from the trustee.[5]

Under the bankrupt acts of 1841 and of 1867, the district courts could in certain cases enjoin further proceedings in the courts of a State.[6] They will have the same power under this act, and the Supreme Court has provided that the judge shall hear an application for such an injunction.[7] But the power to enjoin State courts exists only in the cases provided by the bankrupt act.[8] By virtue of § 11 *a* the court can restrain a suit pending in a State court, and by virtue of the clause now under consideration it can restrain proceedings under authority of a State court which would interfere with the operation of the bankrupt act.[9] Thus a court of bankruptcy will restrain

[1] Re Steinheimer, 1 N. B. N. 21.

[2] Act of 1898, § 23 c.

[3] See *infra*, § 486.

[4] Re Fowler, 1 N. B. N. 215; Re Buntrock Clothing Co., 92 Fed. Rep. 886, 1 N. B. N. 228; Smith *v.* Mason, 14 Wall. 419; Stickney *v.* Wilt, 23 Wall. 150; Marshall *v.* Knox, 16 Wall. 551; Milner *v.* Meek, 95 U. S. 252; Sargent *v.* Helton, 115 U. S. 348.

[5] Re Burgoyne, 8 Morrell, 139.

[6] Ex parte Christy, 3 How. 292; Haines *v.* Carpenter, 91 U. S. 254; Dial *v.* Reynolds, 96 U. S. 340; Ex parte Schwab, 98 U. S. 240; Chapman *v.* Brewer, 114 U. S. 158.

[7] Rule XII. (3).

[8] See cases cited in note 6.

[9] Blake *v.* Francis-Valentine Co., 89 Fed. Rep. 691; Re Gutwillig, 90 Fed. Rep. 475, 481, affirmed 92 Fed. Rep. 337; Rautman *v.* Hopkins, 1 N. B. N. 41; Re Kletchka. 92 Fed. Rep. 901; Re Nathan, 92 Fed. Rep. 590.

proceedings under a voluntary assignment for creditors,[1] or foreclosure suits by mortgagees.[2]

This right does not exist except as an incident to bankruptcy proceedings.[3]

It is the better practice if a third person is to be enjoined to file a petition or short bill in equity making him a party.[4] But the injunction may be granted in a summary way without the necessity of bringing a formal suit in equity.[5]

The bankrupt act leaves it doubtful whether the court could refuse to approve a trustee who had been appointed by the creditors under § 44. The Supreme Court Rules provide that the trustee's appointment is subject to be approved or disapproved by the judge or referee.[6] The judge alone can remove.[6] The Rules also provide that no trustee shall be appointed to act in classes of cases [7] and that when there are no assets no trustee need be appointed if no creditor appears at the first meeting.[8] The reasons for refusing approval of a trustee are usually that they are supposed to be too friendly to the debtor or that their interests are adverse to those of the creditors.[9]

In England a trustee will not be confirmed if his personal interests are such that it will be difficult for him to act impartially.[10]

Ordinarily the trustee will be appointed by the creditors. In such a case the creditors will subscribe his letter of appointment and the referee will approve it in writing.[11] If the creditors do not appoint a trustee the referee will do so.[12]

A creditor desiring the removal of a trustee must file a petition stating the reasons.[13] Notice must be given to the trustee of the hearing on the petition and the reasons for removal stated

[1] Re Gutwillig, 90 Fed. Rep. 475, 481, affirmed 92 Fed. Rep. 337; Re Smith, 92 Fed. Rep. 135.

[2] Re Pittelkow, 92 Fed. Rep. 901, 1 N. B. N. 234.

[3] R. S. § 720.

[4] Creditors *v.* Cozzens, 3 N. B. R. 281, Fed. Cas. No. 3378.

[5] Hyde *v.* Bancroft, 8 N. B. R. 24, Fed. Cas. No. 6966; Re Ulrich, 8 N. B. R. 15, Fed. Cas. No. 14,328.

[6] Rule XIII.

[7] Rule XIV.

[8] Rule XV.

[9] *Supra*, § 290.

[10] Re Mardon, 2 Manson, 511; Re Lamb (1894), 2 Q. B. 805.

[11] Form 22.

[12] Form 23.

[13] Form 52.

therein.[1] If sufficient reason is shown the judge will remove the trustee.[2] After the removal the referee must call a meeting for the appointment of a new trustee.[3]

Under clause 18 costs may be imposed on a creditor in a proper case who fails to substantiate his objections to the bankrupt's discharge.[4]

[1] Form 53.
[2] Form 54.
[3] Form 55.
[4] Re Wolpert, 1 N. B. N. 238.

CHAPTER III.

BANKRUPTS.

§ 466. **Act of 1898.** — SEC. 3. ACTS OF BANKRUPTCY. — *a.* Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b. A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the pur-

pose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c. It shall be a complete defence to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d. Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

e. Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond, with at least two good and

sufficient sureties, who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

The first act of bankruptcy is similar to that mentioned in the Act of 1867: "or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors."[1] Transfer under its definition before cited (§ 1, (25)) covers all methods of conveying property absolutely or conditionally, and "conceal" includes secrete, falsify, and mutilate (§ 1, (22)). This act of bankruptcy will, therefore, be committed if the debtor disposes of his property in any way to hinder his creditors.

The intent will be presumed if the natural result of the conveyance will be to hinder creditors.[2]

Under the law of England it was held that the act of departing the realm with intent to delay creditors was complete at the time the debtor departed with this intent, though no creditors were delayed.[3] And this section should be construed in a similar way as the fact of creditors being delayed is not

[1] § 39, 14 Stats. 536, R. S. § 5021.
[2] *Supra*, § 32.
[3] *Supra*, § 33.

made a necessary part of the act of bankruptcy. It was also held in England and the United States that it was not necessary to prove that legal process had been issued where the act of bankruptcy was a concealment of property to escape such process.[1] Concealment means also a concealment of title by fraudulent transfers.[2] It is not necessary to show that any creditor knew of the intent to defraud.[3]

It is a defence if the debtor prove that he was not insolvent at the time the petition was filed (§ 3 *c*), but he may commit this act of bankruptcy while solvent; it is not necessary to prove him insolvent at the time he did the act.[4]

If a transfer be made for value, it is not an act of bankruptcy under this section when the proceeds are used to pay debts.[5] It is not a preference for a debtor to sell or transfer his goods for value in good faith, as the debtor has the right to attempt to continue his business,[6] and the present clause should receive a similar construction.

This act of bankruptcy will be complete if the intent be to hinder or delay only one creditor. The same result was reached under the law of 1867 when the act of bankruptcy was a delaying of creditors generally. The reason given was, that an intention to delay one creditor if carried out would delay them all.[7] No question of this kind can arise under this act, because it is forbidden to delay "creditors, or any of them."

Clause 2 is more restricted than the preference under the Act of 1867,[8] where the act could be committed by a person in contemplation of bankruptcy. "Transfer" will probably, however, be held to cover the same grounds as the words used in the former act, — "make any payment, gift, grant, sale, conveyance, or transfer of money," etc.

[1] *Supra*, § 35.
[2] *Supra*, § 35.
[3] *Supra*, § 39.
[4] Re Dunham, 7 Phila. 611, Fed. Cas. No. 4145; Re Randall, 3 N. B. R. 18, Fed. Cas. No. 11,551; Re Nickodemus, 3 N. B. R. 230, Fed. Cas. No. 10,254; Re Ryan, 2 Sawyer, 411, Fed. Cas. No. 12,183.
[5] Re Sandford, 7 N. B. R. 351, Fed. Cas. No. 12,310; Re Cornwall, 6 N. B. R. 605, Fed. Cas. No. 3250; Re Cowles, 1 N. B. R. 280, Fed. Cas. No. 3297.
[6] *Supra*, § 76.
[7] Re Williams, 3 N. B. R. 286, Fed. Cas. No. 17,703.
[8] § 39, 14 Stats. 536, R. S. § 5021.

A preference is brought about when any creditor is enabled to get a greater part of his debt than another creditor of the same class (§ 60 *a*). The decisions under the last act will be in point as to what is a preference, subject to the qualification that under the present act the debtor must be proved to be insolvent. A man is insolvent when his property, exclusive of any part of it conveyed to hinder creditors, is insufficient, at a fair valuation, to pay his debts (§ 1, (15)).

It is to be noted that an act of bankruptcy may be committed by giving a preference which the trustee will have no right to avoid. The act is complete if the transfer be made with the intent to prefer the creditor, but the trustee cannot avoid the transaction unless the creditor had reasonable cause to believe a preference was intended (§ 60 *b*). And such was the law under the act of 1867.[1] A conveyance of all the debtor's property will usually be a preference.[2]

The intent to prefer need not be the only motive of the bankrupt, nor need the transfer be voluntary.[3] Pressure by the creditor or threats of process will not excuse a transfer.[3]

If the transfer is not in the usual course of business, it is probable that a preference is intended.[4] As to what is the usual course of business of a trader, see § 74.

As a preference is not void at common law, but only by the statutes relating to bankruptcy,[5] it follows that if a person is not declared a bankrupt the transaction cannot be set aside. The trustee is the only person who can inquire into it.[6]

A *bona fide* dealing with property for a fair consideration is not a preference.[7]

It is not a preference to complete a transaction begun before insolvency.[8]

Under § 5128 of the Revised Statutes,[9] as amended by act

[1] Re Nickodemus, 3 N. B. R. 230, Fed. Cas. No. 10,254.
[2] *Supra*, § 70. Goldman *v.* Smith, 93 Fed. Rep. 182; 1 N. B. N. 160.
[3] *Supra*, § 71.
[4] *Supra*, § 74.
[5] *Supra*, § 61.
[6] *Supra*, § 94. See Re Hirth (1899) 1 Q. B. 612.
[7] *Supra*, § 76. Re Little River Lumber Co., 92 Fed. Rep. 585.
[8] *Supra*, § 78.
[9] Formerly § 35 of act of 1867, 14 Stats. 534.

June 22, 1874, c. 390,[1] a preference was not voidable by the assignee unless the preferred creditor knew that the creditor intended a fraud on the act.[2] But now it is voidable if the creditor had reasonable cause to believe a preference was intended (§ 60 *b*).

Under the last law it was a preference to enable a third person to give an undue advantage to a creditor.[3] This would not be an act of bankruptcy under the present law, because the transfer must be to a creditor. While the statute is to be construed liberally as a whole as establishing a system, only those acts are acts of bankruptcy which are stated to be such.[4] A preference of any kind is not void at common law, and cannot be held so under a bankrupt act unless included within its terms. But under § 60 *b* the trustee may recover in such a case.[5]

It was held under the last act that a payment to a person secondarily liable for the debts of the bankrupt was a preference, because such persons were creditors.[6] Section 5021 of the Revised Statutes[7] included indorsers and sureties by name, but it would seem that the same construction should be put on this act. Section 16 provides that a surety of the bankrupt shall not be discharged by the discharge of the bankrupt, and he would undoubtedly be admitted to prove his debt, which if unliquidated might be liquidated under § 63 *b*. The question is merely whether such a person is a "creditor." Sureties have been allowed to prove under former laws.[8]

It was held under the Act of 1867 that a trustee could not make good a defalcation of the property of his *cestui que trust* without committing a preference.[9] The decisions are unsound and should not be followed; the injustice of them is apparent. The *cestui que trust* was not a creditor of the bankrupt, and did not deal with him as such. On this ground alone it should be held that no preference was made when the bankrupt returned

[1] 18 Stats. 180.
[2] *Supra*, § 79.
[3] *Supra*, § 80.
[4] Wilson *v.* City Bank, 17 Wall. 473.
[5] See *infra*, § 523.
[6] *Supra*, § 81.
[7] Formerly § 39 of the Act of 1867, 14 Stats. 536.
[8] *Supra*, § 173.
[9] *Supra*, § 93.

the property he had wrongfully taken from him. The law of England is to that effect.[1]

Statements or admissions by the debtor are admissible as showing insolvency, as well as his transactions and books of account.[2] The question of insolvency and of intent to prefer are for the jury.[3]

Corporations are subject to the act as involuntary bankrupts (§ 4 *b*), and can commit preferences.[4]

Under § 39 of the Act of 1867[5] it was an act of bankruptcy to procure or suffer property to be taken by legal process with intent to give a preference. The Supreme Court of the United States held that this did not apply to a case where the debtor lay by and allowed a creditor to get an advantage by legal proceedings.[6] The present clause was drawn apparently with reference to that case and such a proceeding would be a preference now if the property were sold.[7] It is not necessary to show that the debtor intended giving a preference (§ 3 *a* (3) and § 60 *a*) but merely that he permitted it and did not vacate it within five days before a sale. It is necessary to show that the creditor obtained a preference and the debtor was insolvent.

Mr. Referee Hotchkiss has held in an opinion of great ability that Wilson *v.* City Bank[8] is no longer controlling.[9] He also shows conclusively that the phrase "five days before a sale" means five days before the time set for the sale.

"Legal proceedings" includes proceedings in any court by which a sale or final disposition of the property is effected.[10] The decisions under the Act of 1867 as to what is legal process are in point. Under that law it was an act of bankruptcy to remove property to avoid attachment on legal process.[11] The preference must now be set aside at least five days before the

[1] *Supra*, § 93.
[2] *Supra*, § 98.
[3] *Supra*, § 104.
[4] *Supra*, § 89.
[5] 14 Stats. 536, R. S. § 5021.
[6] Wilson *v.* City Bank, 17 Wall. 473. See *supra*, § 84.
[7] Re Reichman, 91 Fed. Rep. 624; Re Meyers, 1 N. B. N. 207; Re Whalen, 1 N. B. N. 228; Re Moyer, 1 N. B. N. 260.
[8] *Supra*.
[9] Re Meyers, 1 N. B. N. 207.
[10] Mather *v.* Coe, 92 Fed. Rep. 333.
[11] Act of 1867, § 39, 14 Stats. 536, R. S. 5021. See *supra*, § 35.

sale and it would not be sufficient if this were done four and a half days before, though that were on the fifth day.[1]

A general assignment is an act of bankruptcy under the English law and has been so for a long time.[2] It was not mentioned as an act of bankruptcy in the several bankrupt acts passed by Congress, and there was a difference of opinion whether it was such. It was held in many cases to be an act of bankruptcy because it defeated the operation of the act by substituting an assignee of the debtor's own choosing for one chosen by the creditors, and deprived the creditors of their rights to examine the debtor.[3]

If the deed of assignment be in escrow the act will not be complete and the prohibited transfer will not have been committed.[3] The expression "general assignment" means an assignment of all property.[3] Under the English law an assignment of a part of a man's property was valid, but it was held in Wilson *v.* Day[4] that a colorable exception of a small portion of a debtor's property from a deed would not make the deed good. Under the present clause the assignment must include all the property, so an assignment of part of a man's property for the benefit of creditors would not be an act of bankruptcy under this clause, though it might be a preference.

An assignment of all a man's property for value is not an assignment for the benefit of creditors,[5] and would not be an act of bankruptcy under this provision of the act. If given *bona fide* it would be a valid transaction or under certain circumstances it might be void as a preference.[6]

It makes no difference that the conveyance does not purport to cover all of the bankrupt's property if as a matter of fact all his property is included[7] but a transfer will not be a general assignment unless it was intended to be one.[8]

There must be a deed or instrument in writing,[9] and an

[1] See Re North (1895), 2 Q. B. 264.
[2] *Supra*, § 37.
[3] Stites *v.* Champion, 49 N. J. Eq. 446.
[4] 2 Burr. 827.
[5] Evans *v.* Hallam, L. R. 6 Q. B. 713.
[6] *Supra*, § 70.
[7] Robson, Bankruptcy, 7th ed., p. 149. Steedman *v.* Dobbins, 93 Tenn. 397, *contra*.
[8] Haase *v.* Distilling Co., 64 Mo. Ap. 131.
[9] Re Spackman, 24 Q. B. D. 728; Weber *v.* Mick, 131 Ill. 520; Ross *v.* Walker, 52 Ill. Ap. 137.

arrangement whereby all of a debtor's property was to be deposited in a bank for the benefit of creditors was not an assignment for benefit of creditors because it was not an assignment at all.[1] Several different transfers which between them cover all a man's property do not constitute a general assignment.[2] A bill of sale is not an assignment,[3] nor is a mortgage.[4] The assignment must be for the benefit of all the creditors, and if it is made for the benefit of less than all it will not come within the terms of this clause.[5] No creditor who has acquiesced in the assignment can take advantage of it as an act of bankruptcy.[6] The contrary decisions[7] rest on the mistaken assumption that a general assignment is absolutely void. Such an assignment is valid between the parties and voidable only by the trustee in bankruptcy.

An assignment for creditors under a state insolvent law or law regulating general assignments is an act of bankruptcy though valid under the state law.[8]

It is no defence to this act of bankruptcy that the debtor was solvent at the time of making the general assignment.[9]

In England by B. A. 1883, § 4 *f*, a person commits an act of bankruptcy by filing in court a declaration of his inability to pay his debts. It is not sufficient if he signs a declaration; it must be filed by him or with his sanction.[10] Under clause 5 of the present section the declaration must be in

[1] Re Spackman, *supra*.

[2] Letts *v.* McMaster, 83 Ia. 449; Butler *v.* Diddy, 83 Ia. 533; Sells *v.* Rosedale Grocery Co., 72 Miss. 590.

[3] Becker *v.* Rardin, 107 Mo. 111.

[4] State *v.* Hemingway, 69 Miss. 491.

[5] Jones *v.* Loree, 37 Neb. 816; Smith *v.* Phelan, 40 Neb. 765; Jaffrey *v.* Mathews, 120 Mo. 317.

[6] *Supra*, § 51. Re Romanow, 92 Fed. Rep. 510, 1 N. B. N. 218.

[7] Re Curtis, 91 Fed. Rep. 737, 1 N. B. N. 163; Re Simonson, 92 Fed. Rep. 904.

[8] So held by *Brown, J.*, in So. Dist. N. Y. in Re Gutwillig, 90 Fed. Rep. 475, 1 N. B. N. 18, ib. 40; Re Sievers, 91 Fed. Rep. 366, 1 N. B. N. 68; Lea *v.* West, 91 Fed. Rep. 237, 1 N. B. N. 79; Re Smith, 92 Fed. Rep. 135; Davis *v.* Bohle, 92 Fed. Rep. 325; Re Gutwillig, 92 Fed. Rep. 337.

[9] Lea *v.* West, 91 Fed. Rep. 237. The terms of Section 3 b. seem to make insolvency at the time of the petition a prerequisite of bankruptcy proceedings. See 1 N. B. N. 228. Notwithstanding this, the Supreme Court has decided that it is not a defence for one who has made a voluntary assignment to prove solvency at the time the petition is filed. West Co. *v.* Lea, 174 U. S. 590.

[10] Ex parte Johnstone, 4 De G. & S. 204.

writing and is not required to be filed in court but must contain a statement that he is willing to be declared a bankrupt on account of his inability to pay his debts. A corporation may commit this act of bankruptcy,[1] but it has been held that the directors of a Massachusetts corporation cannot pass a valid vote to that effect.[2]

Formerly a petition might be brought at any time within six months of the act of bankruptcy,[3] but now it must be brought within four months. Time is computed by excluding the first day and including the last unless that be a Sunday or holiday, and in that case the next business day is included (§ 31). Such was the rule under the act of 1867.[4] The rule as to the time within which the petition was to be brought when an attachment relied on as an act of bankruptcy was to be recorded was the same as at present.[3] The decisions were to the opposite effect on the question whether the assignee could avoid a preference given more than four months before the petition was filed but not recorded until less than four months.[5] As to whether such a preference can now be upset, see *post*, § 522.

If a petition is filed within four months of an act of bankruptcy the court will have jurisdiction though the subpœna is not served on the debtor till more than four months have elapsed.[6]

When a bankrupt against whom a petition has been filed alleging a conveyance of property to defeat his creditors proves that he was solvent at the time the petition was filed, the petition must be dismissed; the burden of proving this is on him. Under the definition of insolvency given in this act (§ 1, (15)) it may be difficult for creditors to prove that he was insolvent. Under the old received definition of insolvency it would be comparatively easy for a creditor to tell whether a man could meet his debts as they matured, because it would be

[1] Re Marine Machine Co., 91 Fed. Rep. 630.

[2] Re Bates Machine Co., 91 Fed. Rep. 625, 1 N. B. N. 135

[3] *Supra*, § 46.

[4] § 48, 14 Stats. 540, R. S. § 5013. See § 46.

[5] *Supra*, § 85.

[6] Re Lewis, 91 Fed. Rep. 632, 1 N. B. N. 135.

known to his associates in trade whether his debts were paid or not. Now, however, especially in the case of a man owning real estate, this fact may be difficult of proof. Under paragraph *c* the creditors will be in a better position than in proceedings under the second and third subdivisions of § 3*a*, where the burden of proving insolvency is on them, unless the debtor neglects to appear with his books and papers and submit to an examination.

The last two acts of bankruptcy mentioned in § 3*a* are regarded as conclusive evidence of the debtor's insolvency, and a person who has done either of these may be proceeded against without the necessity of proving insolvency at the time of their commission.

As to the form of the petition, see *infra*, § 521.

The provision of clause *e* was inserted to prevent a debtor's property being unnecessarily taken from him. After the adjudication under the Act of 1867,[1] a warrant was given to the marshal to take possession of the property as a part of the usual course of proceedings, and the court had the power to issue a provisional warrant after the petition was filed directing the marshal to take charge of the property and person of the debtor.[2] In neither of these cases was a creditor applying for the warrant required to give a bond. Under the present act the ordinary course will be for the trustee, after his appointment, to take charge of the effects of the bankrupt (§ 47, (2)) though the court would probably have power to issue an injunction against the debtor to prevent his disposal of the property before the adjudication (§ 2, (15)), as was done under the Act of 1867.[3] In cases of urgent necessity they can, under the present act, appoint the marshal to take charge of the estate in order to preserve it.[4]

If the petition is dismissed, the creditor will be liable on his bond for all costs, damages, and counsel fees. The damages in such a case would be large, and the fear of incurring such a

[1] § 42, 14 Stats. 537, R. S. § 5028.
[2] § 40, 14 Stats. 536, R. S. § 5024.
[3] Ib.
[4] See *supra*, § 465.

liability will undoubtedly prevent the creditors from often applying to the court under this clause of the act.[1]

The form of bond is prescribed by Form 9. The Act and the Form contemplate a bond with two sureties. Whether a corporation could be accepted as a surety on this bond may be a question. Section 50 *g* authorizes corporations to become sureties on the bonds of referees and trustees. This does not authorize them to be sureties in any other cases, and the terms of clause *e* do not seem to allow them to act as such in this instance.

§ 467. **Act of 1898.** — SEC. 4. WHO MAY BECOME BANKRUPTS. — *a.* Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.

b. Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.

All persons except corporations may become voluntary bankrupts, irrespective of the amount of their debts. "Person" includes officers, partnerships, and women (§ 1, (19)). Under the act of 1867 corporations also were included, but subject to this qualification, and the further one that, under that act, the person must have owed debts to the amount of $300,[2] the decisions are in point.[3]

[1] See also *infra*, § 532. See Re Smith, 92 Fed. Rep. 135, 1 N. B. N. 61.

[2] § 11, 14 Stats. 521, R. S. § 5014.

[3] See *supra*, §§ 15 *et seq.*

A corporation cannot evade this provision of the act by arranging with certain creditors that a petition shall be filed against it.[1]

Farmers, or persons who work for wages, salary, or hire, at a rate not exceeding $1,500 a year (§ 1, (27)) cannot be made bankrupt. With this exception, all natural persons and most corporations engaged in business, and owing debts of $1,000, are subject to this act. State or national banks are excluded.

The Act of 1867 applied to all natural persons,[2] partnerships,[3] and moneyed, business, and commercial corporations and joint-stock companies.[4]

Married women will come within this section whenever they are made subject to the rights and liabilities of single women.[5]

Infants may also be bankrupts in certain cases,[6] and lunatics who have committed an act of bankruptcy before becoming insane, or in a lucid interval.[7]

An undischarged bankrupt may be proceeded against.[8]

Aliens may be made bankrupts if they have a principal place of business or reside within the United States,[9] and also if they have committed an act of bankruptcy here though they do not reside here.[10]

The Act of 1867 applied to "moneyed, business, and commercial corporations."[11] It was held that railroad companies were included in its provisions,[12] and also insurance companies,[13] and all other corporations except municipal corporations and corporations which are established for educational, ecclesiastical, or charitable purposes.[14] The scope of the present act is much more limited. In place of the three comprehensive classes, we have five kinds of corporations specified, viz., manufacturing, trading, printing, publishing, or mercantile.

[1] Re Bates Machine Co., 91 Fed. Rep. 625, 1 N. B. N. 135.
[2] § 39, 14 Stats. 536, R. S. § 5021.
[3] § 36, 14 Stats. 534, R. S. § 5121.
[4] § 37, 14 Stats. 535, R. S. § 5122.
[5] *Supra*, § 15.
[6] *Supra*, § 16, Re Brice, 1 N. B. N. 310.
[7] *Supra*, § 18.
[8] *Supra*, § 19.
[9] *Supra*, § 20.
[10] *Supra*, § 465.
[11] § 37, 14 Stats. 535, R. S. § 5122.
[12] *Supra*, § 25.
[13] Re Merchants' Ins. Co., 3 Biss. 162, Fed. Cas. No. 9441; Re Independent Ins. Co., 2 Lowell, 97, Fed. Cas. No. 7018; Holmes, 103, Fed. Cas. No. 7017.
[14] Adams *v.* B., H. & E. R. R., 4 N. B. R. 314, Fed. Cas. No. 47.

Railroad companies and other transportation agencies would not seem to be within the terms of the section. They are not comprehended in any of the classes unless it be last, and as to this it may be said that they rather assist mercantile pursuits than are themselves engaged in them. Insurance companies also are probably not subject to the act, since it has been said by the Supreme Court of the United States that the issuing of a policy of insurance is not a commercial transaction.[1]

The broadest one of the terms used in this section is "mercantile." That is defined by Worcester as "relating to trade or commerce." It corresponds with the word "commercial" under the act of 1867. "Business" is a word of much greater scope,[2] and extended the operation of the last act to almost all corporations.

It was held that a railroad company did not come within the terms of that part of the Act of 1867 which related to the suspension of commercial paper by a "banker, broker, merchant, trader, manufacturer or miner."[3] The phraseology is somewhat similar to that of the present section, so that these cases are authorities for the proposition that railroad companies will not come within its terms.

It would seem that a corporation engaged in making lumber would be subject to the act,[4] or a distillery,[5] but a mining company would not, nor would a company engaged in boring for oil.[6] It was held that a livery-stable keeper was not a "merchant" nor subject to the Act of 1841.[7] Under the Act of 1867 a contractor who built a railroad was held not to be a trader.[8] This case suggests the question whether a construction com-

[1] Paul *v.* Virginia, 8 Wall. 168.

[2] Adams *v.* B., H. & E. R. R., 4 N. B. R. 314, Fed. Cas. No. 47.

[3] Re Greenville R. R., Fed. Cas. No. 5787; Winter *v.* Iowa Ry. Co., 2 Dill. 487, Fed. Cas. No. 17,890; Alabama R. R. Co. *v.* Jones, 5 N. B. R. 97, Fed. Cas. No. 126.

[4] Re Chandler, 1 Lowell, 478, Fed. Cas. No. 2591; Re Cowles, 1 N. B. R. 280, Fed. Cas. No. 3297

[5] Re Eeles, 5 Law Rep. 273, Fed. Cas. No. 4302.

[6] Re Woods, 7 N. B. R. 126, Fed. Cas. No. 17,990.

[7] Hall *v.* Cooley, 3 N. Y. Leg. Obs. 282, Fed. Cas. No. 5928. The case of Re Odell, 17 N. B. R. 73, Fed. Cas. No. 10,426, seems in conflict with this, but it was disapproved in a later case. Re Duff, 4 Fed. Rep. 519.

[8] Re Smith, 2 Lowell, 69, Fed. Cas. No. 12,981

pany would be within the act. There would seem to be no power under this section to proceed in bankruptcy against companies organized to operate telegraphs or telephones.

For a learned discussion of this subject see Corporations Under the Bankruptcy Act of 1898, by H. Campbell Black, Esq. in 8 Yale Law Journal, 105.

A corporation is subject to bankruptcy proceedings, although it has been dissolved by a state court.[1]

A person may be adjudged a bankrupt on default or on an impartial trial. This does not mean a trial by jury, for the judge is given the right to make the adjudication where the bankrupt does not claim a trial by jury (§ 18 *d*).

§ 468. **Act of 1898.** — SEC. 5. PARTNERS. — *a.* A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

b. The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

c. The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d. The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e. The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f. The net proceeds of the partnership property shall

[1] Thornhill *v.* Bank of Louisiana, 1 Woods 1, Fed. Cas. No. 13,992; Re Independent Ins. Co., 2 Lowell, 97, Fed. Cas. No. 7018; Holmes, 103, Fed. Cas. No. 7017; Re Merchants' Ins. Co., 3 Biss. 162, Fed. Cas. No. 9441.

be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g. The court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

h. In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

This section is very similar to the corresponding section of the Act of 1867 [1] in its general provisions. There is one important addition, however, which seems to recognize the commercial view of a partnership as a separate entity.[2] Paragraph *g* provides for the proof by an individual estate against the partnership estate and *vice versa*. A provision like this but not

[1] § 36, 14 Stats. 534, R. S. § 5121.
[2] Parsons, Partnership, 4th ed. § 3. See Chemical Bank *v.* Meyer, 92 Fed. Rep. 896.

restricted to the case where both partners and firm were bankrupt was contained in a bankruptcy bill drawn by John Lowell which was introduced in Congress in 1884.[1] This will modify the old law in an important respect.

Under the Act of 1867 one partner might petition to have a firm declared bankrupt.[2] Under the present law § 59 *b* requires that three or more creditors should ordinarily join in a petition unless there are less than twelve creditors. The terms of this section are broad enough to include partnerships, but Rule VIII. seems to contemplate the case of one partner bringing a petition against the partnership. The rule provides that a partner who objects may make any defences which a debtor could make in involuntary proceedings, and if the adjudication is made he must file a schedule and inventory like any other debtor.[3]

A partnership may be adjudged bankrupt at any time before its affairs are settled.[4] The law was to this effect also under the Act of 1867,[5] but it was different under the Act of 1841.[6]

When one partner files a petition for the firm and some partners do not join, notice should be given them,[7] as the assets of the firm can not be administered without bringing all the partners in.[8] And a firm cannot be declared bankrupt while there is a solvent partner.[9]

The rule laid down in paragraph *b* was the law under the act from which this provision is drawn.[10] If some of the partners are bankrupt but not the firm the trustee will be appointed by joint and separate creditors. The proceedings under this clause refer only to cases where the firm is bankrupt. Under the Act of 1867 firm creditors could vote for the assignee of a bankrupt partner,[11] and such is probably the rule now.

[1] See Lowell Bill, Bankruptcy of Partners, by Alfred Mack, Esq., 19 Am. Law Rev. 32.

[2] § 36, 14 Stats. 534, R. S. § 5121.

[3] General Orders in Bankruptcy, Rule VIII.

[4] Re Levy, 1 N. B. N. 287.

[5] *Supra*, § 22.

[6] Re Hartz, Fed. Cas. No. 6174.

[7] Re Lewis, 2 Ben. 96, Fed. Cas. No. 8311.

[8] Shumate *v.* Hawthorne, 3 N. B. R. 227.

[9] Hanson *v.* Paige, 3 Gray, 239; Re Bennett, 2 Lowell, 400, Fed. Cas. No. 1314.

[10] Re Phelps, 1 N. B. R. 525, Fed. Cas. No. 11,071.

[11] Wilkins *v.* Davis, 15 N. B. R. 60, Fed. Cas. No. 17,664.

The proceedings may be begun in any court of bankruptcy which has jurisdiction over a partner. Under the Act of 1867 if petitions were filed in different districts the first court in which a petition was filed retained control.[1] Section 32 of the present act provides that in such a case the proceedings shall be transferred to the court which can deal with them for the greatest convenience of parties in interest. Rule VI. seems to conflict with this section. It has different provisions for the case where petitions are filed by creditors than in the case where the partners file them.

As to petitions filed by creditors of a partnership, Rule VI. provides that the one first filed shall be first heard and the others may be stayed meanwhile. The court which first makes adjudication is to keep control. The provisions of § 32 of the act are departed from in this rule. The only way of reconciling them is to hold that § 32 does not apply to petitions against a partnership but merely against the different members. In view of the comprehensive meaning of "person" used in this section such a construction seems strained. In the case of a conflict between the rule and the section the former must give way, because it is valid only so far as it carries the "act into force and effect."[2]

Rule VI. also provides that the petition first filed may be amended by alleging an earlier act of bankruptcy if that earlier act had been alleged in any of the other petitions.

As to petitions by members of a partnership, Rule VI. provides that the first petition shall be acted on unless the court is satisfied that it would be for the greatest convenience of parties in interest to have another court proceed with it.

The rule of paragraph *d* was contained in the Act of 1867 and is made necessary by the mode of distribution prescribed by paragraph *f* of this section.

The general rule as contained in paragraph *f* has always prevailed in the United States. It was adopted from the law of England by statute or decision.[3] In England an exception

[1] *Supra*, § 119.
[2] Act of 1898, § 30.
[3] *Supra*, § 120.

was made in favor of joint creditors where there were no joint assets and no solvent partner.[1] In such a case they were allowed to prove against the separate estates, but this rule was regarded with disfavor and was departed from where there were any joint assets at all though insignificant in amount. The courts were glad to find a pretext for disregarding the rule and did so in several cases where the separate creditors were clever enough to create a joint fund by buying up worthless joint assets for a small sum.[2] By the operation of this rule separate creditors who had given credit to the separate partners were placed in no better position than joint creditors who had looked to the firm for the payment of their debts. This was clearly a departure from the rule that joint assets should be used to pay joint debts and separate assets to pay separate debts. The decisions in the United States were not uniform. The courts of Massachusetts did not recognize the exception and other authorities followed them, but many courts followed the English rule.[3] Judge Lowell has held in an opinion of great learning and ability that this exception does not prevail under the Act of 1898.[4]

Under the decisions in England and the United States a partner can not prove against the bankrupt firm or the separate estate of another partner except for a debt totally disconnected with firm affairs[5] unless all the joint debts are paid, because, as it is said, he would be proving against his own creditors.[6] An exception is made if a partner has fraudulently abstracted firm property. In that case the other partners are allowed to prove against his estate.[7] This rule of law so far as it relates to cases where the firm and its partners are bankrupt is abrogated by paragraph *g*, which allows the proof of a claim of a partner's estate against the partnership estate, and puts the partners on the same footing as creditors with regard to proof against the firm when both are bankrupt.

[1] *Supra*, § 125.
[2] Ib.
[3] Ib.
[4] Re Rouss, 94 Fed. Rep. 84.
[5] *Supra*, § 134.
[6] *Supra*, §§ 133, 134.
[7] *Supra*, § 134.

After all joint debts are paid, the surplus goes to the separate estates,[1] and after the separate estates have paid the claims of separate creditors the surplus goes to the joint assets. It is held that in determining the surplus of the respective estates joint creditors are entitled to interest but separate creditors are not.[2] Under the broad powers conferred by the latter part of paragraph *g* this unjust and irrational distinction may be disregarded.

The phrase "prevention of preferences" contained in paragraph *g* was probably aimed at the fraud brought about by partners agreeing just before their bankruptcy to change joint into separate assets. Thus the joint creditors were deprived of their rights and the separate creditors preferred.[3] Many fine distinctions were made in order to prevent this fraud,[4] and in the United States such a transaction was held void as a preference if made within the statutory limit.[5] Under the present law the court may marshal the assets so as to prevent this kind of injustice.

The courts should not give a restricted meaning to the word "preferences" used in this paragraph. The clause was intended to give the courts power to transcend technical rules and distribute the assets equitably. If "preference" is construed strictly the court will be given no more power than it had under the old act which contained no such provision.[6] Thus it should not be held that an arrangement by partners to turn joint into separate assets could not be set aside if four months had passed, or if the separate creditors did not have reasonable cause to believe a preference was intended; or if some other technical requirements of a preference were absent. It is to be hoped also that the courts will not construe the first part of paragraph *g* so strictly as to hold that it applies only to a case where all the partners as well as the firm are bankrupt. Its terms are broad enough to include a case where the firm and some of the partners are bankrupt, though in that case the solvent partners could not prove against the firm.

[1] *Supra*, § 135.
[2] Ib.
[3] *Supra*, § 137.
[4] Ib.
[5] *Supra*, § 139
[6] Ib.

The court formerly had power to wind up the partnership affairs, but the practice was usually the same as that prescribed by paragraph *h*.[1] The trustee of a bankrupt partner becomes a tenant-in-common with the other parties and under the old law he could sell his interest.[2] The trustee would probably be allowed to do this now if it were for the best interests of the estate.

§ 469. **Act of 1898.** — SEC. 6. EXEMPTIONS OF BANKRUPTS. — *a*. This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

The Act of 1867[3] declared certain property to be exempt, and provided that the exemption laws of a state existing at a specified time should determine the other property of the bankrupt which was to be exempt. Under these acts it was not possible for a state to change its exemption laws so as to affect proceedings in bankruptcy without an act of Congress.[4] Under the present act the state laws as to exemptions may be changed at any time, and it will be in the power of the states to affect proceedings in bankruptcy in a serious way.

The state law will determine the exemptions to be allowed to a bankrupt. Accordingly it has been held in the district court of Georgia that a partner may have an exemption out of partnership assets,[5] provided his interest in the firm amounts to the value of the exemption. The determination of this question will differ in different districts.[6] On principle it would seem that as the present act recognizes the firm as a separate entity distinct from the partners,[7] no exemption should be allowed to the partners out of the assets of the firm.

[1] *Supra*, § 127.
[2] Ib.
[3] § 14, 14 Stats. 522, R. S. 5045.
[4] *Supra*, § 4.
[5] Re Camp, 91 Fed. Rep. 745, 1 N. B. N. 142.
[6] See cases cited in Re Camp, *supra*.
[7] *Supra*, § 468.

As to whether a waiver of exemptions by a debtor operates in favor of a trustee in bankruptcy, see Re Camp[1] and the cases cited therein, and Re Hopkins.[2]

Taxes due on exempt property must be paid by the trustee under the terms of § 64.[3]

When the exemption laws of a state conflict with some provision of the bankrupt act, as that in regard to policies of insurance, the latter will prevail.[4]

The exemptions of a bankrupt must be given him though he may have concealed some of his property from his trustee, and this is forbidden by the act.[5]

§ 470. **Act of 1898.**—SEC. 7. DUTIES OF BANKRUPTS. —*a.* The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind

[1] 91 Fed. Rep. 745, 1 N. B. N. 142.

[2] 1 N. B. N. 71. See also Re Garden, 1 N. B. N. 189.

[3] Re Tilden, 91 Fed. Rep. 500.

[4] Re Lange, 91 Fed. Rep. 361, 1 N. B. N. 60.

[5] Re Peterson, 1 N. B. N. 215.

of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

The word "court" may include the referee (§ 1, (7)), but in clause 1 it probably does not. By § 21 a court of bankruptcy may, upon application, order any person, including the bankrupt, to appear and be examined. "Court of bankruptcy" does not include the referee (§ 1, (8)). By construing these two provisions together, it seems that only a court of bankruptcy or a

judge thereof can order a bankrupt to appear at the first meeting. This is provided for in the order of reference[1] of the case to a referee, which contains a command to the bankrupt to appear before the referee on a day fixed. After that the bankrupt is subject to the orders of the referee, who shall take all proceedings except those which the act requires the judge to do.[2]

The proviso to § 7 enacts that the bankrupt need not examine claims unless they are presented to him. This provision qualifies clause 3.

The bankrupt need not execute transfers of property situated within the United States. This property is taken from him by operation of law (§ 21 *e*). The provision of clause 5 is necessary, because the decree of a court of bankruptcy has no operation outside of the United States.

Clause 8 contains the substance of Rev. Stats. §§ 5015, 5016, and 5017,[3] except that it adds the exemptions which were formerly not required to be stated.

Every debtor must file two schedules, A and B, the first containing a list of all his debts, and the second a list of his property.[4] Schedule A comprehends several different particulars which are contained in different sheets. First, there is a list of all claims having priority; second, a list of secured creditors; third, of unsecured creditors. The fourth is a list of liabilities on bills and notes, and the fifth of liabilities on accommodation paper.

The first sheet of schedule B shows the real estate of the debtor; the second, the personal estate; the third, the *choses in action*, comprising the debts due the bankrupt on open account, the policies of insurance, stocks and bonds, deposits in banks, and unliquidated claims of all kinds. The fourth sheet contains a list of property held in trust for the bankrupt, or to which he has a claim in reversion or remainder. This sheet must contain also a statement of all property he has conveyed for the benefit of creditors, and the sums he has paid to counsel

[1] Form 14.
[2] Rule XII. 1.
[3] Act of 1867, § 11, 14 Stats. 521.
[4] Form 1.

for services in bankruptcy. The fifth sheet is a list of the debtor's exemptions, and the sixth a list of all the books, deeds, and papers relating to his estates.[1] All the sheets of each schedule must be signed by the bankrupt, and each schedule must be sworn to. The form of the oath is prescribed.[2] A summary of the schedules is also to be filed, but need not be signed nor sworn to by the bankrupt. The summary is new under the present act, and will be found of great assistance. The form of the schedules is the same for all debtors, whether voluntary or involuntary.

Amendments may be made to the schedules on application to the court. Separate amendments must be made to each sheet of the schedule amended. They are to be verified under oath and be in the same form as the original schedules.[3]

In an involuntary case, if the debtor is absent or can not be found, the petitioning creditors must file a list of the bankrupt's creditors.[4]

There was a case under the last act of Congress where the bankrupt was examined before the adjudication.[5] By the terms of § 21 of the present act this could not be done, because the examination is to be concerning an estate which is being administered under the act, which will only be the case after the person is adjudged bankrupt.

After his discharge it was the law that the bankrupt was not obliged to be in readiness to attend the court and submit to an examination but could be summoned in like any other witness.[6] This was important because the act of 1867 was construed to deny to a bankrupt witness fees and expenses.[6] Now he is to be paid his expenses when the examination takes place away from his residence. (Proviso to § 7.) The definition of bankrupt in the present act includes a discharged bankrupt when a petition is filed to revoke his discharge or set aside a composition. It would seem therefore that in these cases the bankrupt might be examined.[7]

[1] Form 1.
[2] Ib.
[3] Rule XI.
[4] Rule IX.
[5] *Supra*, § 144.
[6] *Supra*, § 145.
[7] See Re Peters, 1 N. B. N. 165.

At the first meeting of creditors the referee may examine the bankrupt of his own motion, or cause him to be examined if a creditor asks it (§ 55 *b*). An examination of a debtor may be ordered at any time.[1]

The examination of the bankrupt is not governed by rules so strict as those of ordinary trials and he may be asked as to matters of hearsay.[2]

In England a bankrupt was bound to answer criminating questions.[3]

An examination of the debtor will be ordered for the purpose of ascertaining whether he has committed any act which will prevent his discharge. The order should be asked for on the return day of the notice of his application for a discharge.[1]

The general rule in this country has been that a bankrupt was not subject to examination after his discharge.[4] It has been said that the rule at present is different.[5] It will be noticed, however, that the duty of submitting to examination is imposed on a debtor as a bankrupt.[6] A bankrupt is defined to be a "person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt."[7] It would seem therefore that after his discharge a bankrupt can not be examined unless an application to revoke the discharge has been filed.

It has been held that the provision of clause 9 that no testimony given by a bankrupt shall be used against him is not sufficiently broad to meet the constitutional requirements. A bankrupt may therefore refuse to answer a criminating question.[8] But a voluntary bankrupt must allow his books to be examined, though they contain incriminating evidence.[9]

[1] Re Price, 91 Fed. Rep. 635, 1 N. B. N. 131.

[2] *Supra*, § 157.

[3] *Supra*, § 158.

[4] Re Dole, 9 N. B. R. 193, Fed. Cas. No. 3964; Re Dean, 7 N. B. R. 768, Fed. Cas. No. 3701; Re Jones, 6 N. B. R. 386, Fed. Cas. No. 7449; Re Witkowski, 10 N. B. R. 209, Fed. Cas. No. 17,920; Wagner *v.* Superior Court, 100 Cal. 359; Pub. Stats. Mass. c. 157, § 70. See § 145.

[5] Re Peters, 1 N. B. N. 165.

[6] Act of 1898, § 7.

[7] Act of 1898, § 1 (4).

[8] Re Scott, 1 N. B. N. 161.

[9] Re Sapiro, 92 Fed. Rep. 340.

Besides the duties mentioned in this section it is provided in § 3 *d* that the bankrupt shall appear at the hearing on the question of his bankruptcy if he denies it, and submit to examination. In default of which the burden of proving solvency rests on him.

If the bankrupt is in prison at the time he files his petition he may be produced on *habeas corpus* to testify relative to the bankruptcy proceedings.[1]

The bankrupt is not to be examined at a place more than one hundred and fifty miles from his home or place of business unless the court for cause orders it. He is to be paid his actual expenses from the estate when required to attend at any place away from his residence. Residence is used here in contradistinction to place of business. The bankrupt would then be entitled to be repaid his expenses if he were examined at his place of business when that was in a different "city, town or village" than his residence. The provision for paying the bankrupt's expenses corrects an injustice arising out of the decisions under the act of 1867.[2]

It is to be noted in considering § 7 that there is no duty imposed on the bankrupt of taking care of his estate after he has filed a petition or after a petition has been filed against him. For the reasons stated in considering § 3 *e* it is probable that the estate of a bankrupt will not often be given in charge of the marshal, and the bankrupt will have every opportunity to waste his property or convey it away. Under the last act a safeguard was provided against the bankrupt's doing this before the marshal was put into possession after the adjudication, by enacting that a discharge should be refused a bankrupt who had been negligent in the care of his property or had wasted or destroyed it.[3] Under the present act a discharge is to be refused if the bankrupt has committed an offence under the act (§ 14 *b*). One of the offences is that of concealment of property from the trustee (§ 29 *b* (1)). This is the only offence relating to the care of property. There is nothing in the act

[1] Rule XXX. See *supra*, § 146.
[2] *Supra*, § 145.
[3] § 29, 14 Stats. 531, R. S. 5110.

which will enable the court to punish a bankrupt who has wasted or destroyed his property. This is a serious defect which can be easily taken advantage of by a debtor.

The method of enforcing obedience to the obligations laid on a bankrupt by section 7 will be by punishing him for contempt when any of the duties have been imposed by an order of the judge or referee [§ 2 (13), (16)].

§ 471. **Act of 1898.** — SEC. 8. DEATH OR INSANITY OF BANKRUPTS. — *a.* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

The Act of 1867 provided that the proceedings should not abate if the debtor died after the issuing of the warrant.[1] It was held that involuntary proceedings would abate if the debtor died before the adjudication,[2] and that no discharge could be granted if the bankrupt had not before his death applied for his discharge and taken the oath required by § 5113[3] that he had done nothing which would prevent him from obtaining his discharge.[4] The present section does not contain the limitation as to the issuing of the warrant which in involuntary proceedings under the last act was after adjudication.[5]

Two cases in England are instructive on this difference in phraseology. In Ex parte Obbard,[6] decided before the passage of the Bankruptcy Act of 1883, it was held that the proceedings must be discontinued where the debtor died after the

[1] § 12, 14 Stats. 522, R. S. 5090.

[2] Frazier *v.* McDonald, 8 N. B. R. 237; Fed. Cas. No. 5073.

[3] Formerly § 29 of the Act of 1867, 14 Stats. 531.

[4] Re O'Farrell, 2 N. B. R. 484, Fed. Cas. No. 10,446; Re Gunike, 4 N. B. R. 92, Fed. Cas. No. 5868.

[5] Act of 1867, § 42, 14 Stats. 537, R. S. § 5028.

[6] 24 L. T. N. S. 145.

petition was filed but before the adjudication. The court was at that time bound by section 80 of the act of 1869, which was similar to section 5090 of the Revised Statutes. The Bankruptcy Act of 1883 by section 108 changed the rule so that the proceedings should not be dismissed after a petition was filed, and it was held in Re Walker [1] that when the debtor died after the petition was filed but before adjudication the court could keep control of the bankruptcy proceedings. The section of the act of 1883 is similar to the present clause, which should receive a similar construction. There would be no difficulty in the case of a voluntary petition or an uncontested involuntary petition. The court might have trouble in contested cases in determining the fact of insolvency or that an act of bankruptcy had been committed, but this consideration does not show that the court ought not to proceed in such cases, but merely that it should dismiss the petition if the facts alleged are not made out.

As the bankrupt under the present act is not obliged to file an oath when he applies for a discharge there would seem no difficulty in granting a discharge after the death of the bankrupt. Under the old English practice of granting a certificate of conformity, a debtor was required to make oath that he had got the creditor's consent to the certificate honestly. In several cases it was held that the death or absence of the debtor did not prevent the allowance of the certificate.[2]

§ 472. **Act of 1898.** — SEC. 9. PROTECTION AND DETENTION OF BANKRUPTS. — *a.* A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would

[1] 54 L. T. N. S. 682.

[2] Ex parte May, 2 M. D. & De G. 381; Ex parte Waterhouse, ib. 760; Ex parte Currie, 10 Ves. 51. See Re Parker, 1 N. B. N. 261.

not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act.

b. The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

The Act of 1867[1] contained a provision similar to clause 2. Rule XXVII. established by the Supreme Court under that act provided that a writ of *habeas corpus* might be issued by the district court in case any bankrupt were imprisoned, and if he were held on a claim provable in bankruptcy he would be released. It was held that the district court could not determine the question whether there was any foundation for the suit on which the debtor was arrested, but if it appeared on the

[1] § 26, 14 Stats. 529, R. S. § 5107.

face of the papers that there was a claim which would not be released by the bankrupt's discharge he was to be sent back.[1] An arrest before bankruptcy proceedings were begun would not be affected by them and the court had no power to release the prisoner,[2] and such would be the decision under the present act, as the word "bankrupt" means a person involved in bankruptcy proceeding (§ 1, (4)), and Rule XXX. is in the same terms as former Rule XXVII. and omits all mention of persons imprisoned before the petition is filed.

The privilege from arrest while in attendance on the court exists independent of legislation.[3]

Rule XXX. provides also that when a creditor imprisons a debtor after his petition is filed the court may on application and notice to the creditor discharge the debtor if the debt is one provable in bankruptcy.

The rule relates in terms only to voluntary bankrupts but the court would have power under the act to take similar proceedings in involuntary cases.

The debtor may receive from the referee a protection against arrest at any time after the case has been sent to a referee. The protection from arrest will last until the determination of the question of the debtor's discharge.[4]

Rule XXX. is open to the same objection that was made to former Rule XXVII. The Act of 1867 [5] gave the bankrupt immunity from arrest on a claim which would be released by a discharge, while the rule extended this immunity to claims made provable by the act. It was held that so far as the rule applied to arrest on provable debts which were not released it was void.[6] This decision is applicable to the present Rule XXX., which has the same scope.

One of the clauses of § 5024 of the Revised Statutes [7] au-

[1] Re Devoe, 2 N. B. R. 27, Fed. Cas. No. 3843; Re Kimball, 2 N. B. R. 204, Fed. Cas. No. 7768.

[2] Re Walker, 1 N. B. R. 318, Fed. Cas. No. 17,060; Hazelton *v.* Valentine, 2 N. B. R. 31, Fed. Cas. No. 6287.

[3] Re Kimball, 1 N. B. R. 193, Fed. Cas. No. 7767.

[4] Rule XII. 1.

[5] § 26, 14 Stats. 529, R. S. 5107.

[6] Re Glaser, 1 N. B. R. 336, Fed. Cas. No. 5474. See Re Seymour, 1 N. B. R. 29, Fed. Cas. No. 12,684.

[7] Originally § 40 of Act of 1867, 14 Stats. 536.

thorized the debtor's arrest in a similar manner before the adjudication, but not after.[1]

The provision of paragraph *b* gives the court greater power, but the bankrupt can be held in custody only ten days. The warrant should give authority to the marshal only to bring the debtor before the court,[1] because the judge has power to keep the debtor for ten days only after the hearing if it appears that the facts alleged are true.

§ 473. **Act of 1898.** — SEC. 10. EXTRADITION OF BANKRUPTS. — *a*. Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

The proceedings for removal of a person under indictment from one district to another are prescribed by § 1014 of the Revised Statutes, which provides for the arrest of a person who has committed any offence against the United States. The proceedings are to be in the form used in the State where the offender is arrested. The judge of the district court is to issue a warrant for the removal of the prisoner after his arrest to the district where the offence was committed. If the indictment is sufficient on its face, and no evidence is offered to contradict it, the order for removal will be made.[2] But when the indictment does not set out an offence against the United States, or one committed in the jurisdiction of the court where the offender is to be tried, the warrant for removal will not be made.[3]

As to whether a warrant for the arrest of the offender may

[1] Usher *v.* Pease, 116 Mass. 440, 12 N. B. R. 305.

[2] Re Alexander, 1 Lowell, 530, Fed. Cas. No. 162; Re Clark, 2 Ben. 540, Fed. Cas. No. 2797.

[3] Re Buell, 3 Dill. 116, Fed. Cas. No. 2102.

be issued by the court of the district to which he is to be removed, see 2 Moore, Extradition, p. 855.

For the numerous decisions on the meaning of various parts of the statute, see Vols. I. and II. of Gould & Tucker's Notes to the Revised Statutes.

§ 474. **Act of 1898.** — SEC. 11. SUITS BY AND AGAINST BANKRUPTS. — *a.* A suit which is founded upon a claim for which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b. The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c. A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d. Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

The right to enjoin proceedings in a state court does not exist independently of a bankrupt law.[1] Section 5106 of the Revised Statutes[2] provided that no creditor having a provable claim should prosecute a suit against the bankrupt to final judgment

[1] R. S. § 720.

[2] Formerly § 21 of the Act of 1867, 14 Stats. 526.

until the question of the debtor's discharge was determined. This differs in several important respects from the provision in the present act. Thus an action on a provable debt was stayed whether it would be affected by the bankrupt's discharge or not.[1] These decisions are not in point now.

Suits against a voluntary bankrupt are not in terms affected, as the clause under consideration applies only to persons against whom a petition has been filed. But as by definition 1 of § 1 a "person against whom a petition has been filed" includes a voluntary bankrupt, it would seem that this clause related to such a person also. This conclusion is enforced by the consideration that a bankrupt law should be construed in a broad way as establishing a practical system.[2] And the exact phraseology of the definition is used nowhere in the act, so it would appear that it was the intention of Congress to apply the definition to a case like this.

There is nothing in this section which would make it apply to a suit begun after bankruptcy proceedings were commenced, and the difference in phraseology between this act and the Revised Statutes is significant in this connection.

The former statute applied to suits "at law or in equity." The word "suit" here would seem to cover the same ground. Contempt proceedings in a state court have been stayed,[3] and so of other proceedings under state laws.[4]

It was held under the last bankrupt law that a suit against a corporation would not be stayed, because corporations were not discharged under that act.[5] But these cases have no authority now, because there is nothing in the present act excepting corporations from the provisions as to discharge.

Under the present act suits against a bankrupt are to be

[1] Re Rosenberg, 2 N. B. R. 236, Fed. Cas. No. 12,054; Re Migel, 2 N. B. R. 481, Fed. Cas. No. 9538; Re Duncan, 14 N. B. R. 18, Fed. Cas. No. 4131; Re Ghirardelli, 4 N. B. R. 164, Fed. Cas. No. 5376.

[2] Re Locke, 2 N. B. R. 382, Fed. Cas. No. 8439; Re Muller, 3 N. B. R. 329, Fed. Cas. No. 9912; Re Silverman, 4 N. B. R. 522, Fed. Cas. No. 12,855; Re Eeles, 5 Law Rep. 273, Fed. Cas. No. 4302.

[3] Re Summers, 1 N. B. N. 60.

[4] Lea *v.* West, 91 Fed. Rep. 237, 1 N. B. N. 79.

[5] Allen *v.* Soldiers' Despatch Co., 4 N. B. R. 537; Meyer *v.* Aurora Ins. Co., 7 N. B. N. 191.

stayed without requiring the bankrupt to apply for a stay. Under the act of 1867 it was necessary to ask for a stay in the court where the suit was pending.[1]

This clause includes an action by a creditor who has proved his debt, and renders unnecessary the provisions of § 5105 of the Revised Statutes,[2] that a creditor who has proved shall not prosecute his action.[3] In this respect also the present law differs from § 5106 of the Revised Statutes,[4] which applied only to creditors who had provable debts which they had not proved.[5]

The trustee may prosecute or defend any suit pending at the time of the bankruptcy if the court authorizes it. He may institute any new suit without requiring authority of the court, apparently (70 *a*, (6)). Section 5047 of the Revised Statutes[6] applied to the right of assignees with regard to all suits, whether brought before the bankruptcy of the debtor or afterward by the assignee, and did not require an order of court to allow him to proceed.

The trustee's duty is to collect the estate of the bankrupt, and he should have the right not to prosecute or defend a suit if he thinks it best for the estate not to do so. The sections here considered seem to adopt this view, as the word "may" is used.

Under the Act of 1867 an action against a bankrupt was valid if the trustee allowed it to proceed,[7] and if he appeared and defended he could not afterward object to the jurisdiction of the court.[8] These decisions are applicable to the present act subject to the qualification that if the suit be on a claim which would be released by a discharge it will be stayed by the operation of the first clause of section 11.

[1] *Supra*, § 451.

[2] Formerly § 21 of the Act of 1867, 14 Stats. 526.

[3] Scott *v.* Ellery, 142 U. S. 381.

[4] Formerly § 21 of the Act of 1867, 14 Stats. 526.

[5] Scott *v.* Ellery, 142 U. S. 381.

[6] Formerly §§ 14, 16 of the Act of 1867, 14 Stats. 523, 524.

[7] Doe *v.* Childress, 21 Wall. 642; Eyster *v.* Gaff, 91 U. S. 521; Burbank *v.* Bigelow, 92 U. S. 179; McHenry *v.* La Société Française, 95 U. S. 58.

[8] Scott *v.* Kelly, 22 Wall. 57; Davis *v.* Friedlander, 104 U. S. 570; Winchester *v.* Heiskell, 119 U. S. 450.

A trustee can not defend an action against a bankrupt which is of a purely personal nature.[1]

The trustee may authorize the bankrupt to sue.[2]

Section 2 of the Act of 1867[3] provided that no suit at law or in equity should be maintained between the assignee and a person claiming an adverse interest in any property transferable to the assignee more than two years after the cause of action arose.[4] It was held in several cases that this section did not apply to an action to collect a debt or for breach of a contract, but these decisions were overruled in Jenkins *v.* International Bank.[5] This question could not arise under the present act.

It was held in Bailey *v.* Glover[6] that where a cause of action arose from fraud the assignee could sue at any time within two years after the fraud was discovered, but all other suits will be barred, it seems, under the present act whether they relate to property vested in the assignee or not. One chief purpose of this act is to settle up bankruptcy proceedings as quickly as possible[7] and the clause in terms applies to all suits.

Re Conant[8] decided that a provision of the law of 1841 similar to the section of the Revised Statutes already cited did not apply to suits against an assignee arising out of his dealings with the estate after it came into his hands. That case is not an authority in determining the meaning of the present act.

The difference in phraseology between this clause and the former act is significant. Here the suit must be brought within two years after the estate is closed. Under that law it had to be begun within two years after the cause of action arose. The courts were anxious to afford a remedy in the case of fraud and seized on the pretext that no cause of action arises on a fraud till it is discovered. This is not a strictly accurate

[1] McClurg *v.* State Bindery Co., 3 So. Dak. 362.

[2] Thatcher *v.* Rockwell, 105 U. S. 467.

[3] 14 Stats. 518, R. S. § 5057.

[4] Clark *v.* Clark, 17 How. 315; Banks *v.* Ogden, 2 Wall. 57; Gifford *v.* Helms, 98 U. S. 248; Doe *v.* Hyde, 114 U. S. 247.

[5] 106 U. S. 571.

[6] 21 Wall. 342. See also Rosenthal *v.* Walker, 111 U. S. 185; Traer *v.* Clews, 115 U. S. 529.

[7] See *infra*, § 528.

[8] 5 Blatch. 54, Fed. Cas. No. 3086.

statement of law but is a good enough excuse for refusing to follow the strict rule. But at present no such excuse can be devised. The right of action is barred after the estate has been closed for two years and no ingenuity can work out a remedy where a fraud is discovered after that time. Bailey *v.* Glover [1] therefore is not an authority under the present act.

It was held that a suit by an assignee against a bankrupt for property concealed by him was not barred by § 5057 of the Revised Statutes.[2] Such a suit would be barred by § 11 *d*, which applies to all suits by a trustee.

A purchaser from a trustee whose rights are barred by lapse of time takes no greater title than the trustee had.[3] The bar of the statute runs after transfer by the trustee as well as before.[4]

The estate will be closed when the final account of the trustee has been accepted at the final meeting of the creditors (§ 55 *f*.). The trustee must file his final report and accounts fifteen days before this (§ 47 (8)) and make a detailed statement of the administration of the estate which he must lay before the final meeting (§ 47 (7)). There is no provision in this act for the discharge of the trustee, but this is provided by Form 51.[5]

Suits on a trustee's bond must be brought within two years after the estate is closed.[6] Trustees are not liable personally or on their bonds to the United States for any penalties or forfeitures incurred by the bankrupts.[7]

It is clear that the district court has no power over a suit brought before his bankruptcy by a debtor on a cause of action which will not pass to the trustee. If such a suit is pending the bankrupt may prosecute it himself and need not apply to the district court for authority to do so.[8]

§ 475. **Act of 1898.**—SEC. 12. COMPOSITIONS, WHEN CONFIRMED.—*a*. A bankrupt may offer terms of compo-

[1] 21 Wall. 342.
[2] Thomas *v.* Blythe, 55 Fed. Rep. 961.
[3] Gifford *v.* Helms, 98 U. S. 248; Wisner *v.* Brown, 122 U. S. 214.
[4] Greene *v.* Taylor, 132 U. S. 415.
[5] See *infra*, § 510.
[6] Act of 1898, § 50 m.
[7] Act of 1898 § 50 i.
[8] Re Haensell, 91 Fed Rep. 355.

sition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.

b. An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c. A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

d. The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e. Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

In June, 1874,[1] Congress amended the bankrupt act so as to provide for compositions before or after an adjudication. This act was like a provision in the act of 1869 in England.[2] It was found that this scheme was open to several objections. The bankrupt could often get his discharge by paying less than his assets would enable him to pay if the composition were confirmed before his examination. Creditors were very likely to require an undue advantage to themselves before agreeing to the composition; and difficulties were encountered in carrying out its provisions.[3] These obstacles are met in the present act by providing that the bankrupt shall not offer a composition before his examination (§ 12 *a*), and shall not file the application in court until he has deposited in some place designated by the judge the money necessary to carry it out. Creditors are discouraged from attempting to influence the proceedings in the manner above described by being made subject to imprisonment for two years if they attempt to extort money as a consideration for acting in bankruptcy proceedings (§ 29 *b* (5)). It would seem that with these safeguards the present scheme might operate successfully. The judges are given sufficient power by paragraph *d* to refuse to confirm a composition which is too favorable to the debtor.

Provisions for composition are contained in the English law and in the laws of the Continental nations, and have become an established part of those systems of bankruptcy.[4]

As paragraph *a* authorizes compositions only after an examination which does not take place till after adjudication (§ 55), its scope is quite different from that under the act of Congress of June, 1874. Several questions which were discussed under that act as to the effect of a composition before adjudication on an attachment,[5] and the right of creditors having attached

[1] Act of June 22, 1874, § 17, 18 Stats. 182.

[2] Re Haskell, 11 N. B. R. 164, Fed. Cas. No. 6192.

[3] See an article by John Lowell in 1 Lalor's Encyclopædia, p. 223.

[4] Robson, Bankruptcy, 7th ed. p. 745 *et seq.* See an essay on Bankruptcy by S. Whitney Dunscomb, Jr., Esq., in the second volume of the Studies on History, Economics, and Public Law, published by Columbia College, at p. 84.

[5] Re Shields, 15 N. B. R. 532, Fed. Cas. No. 12,784.

within four months to vote at a composition meeting before the debtor is declared bankrupt[1] do not arise now. And the provisions of the former act are so different from the present that but little help will be got from decisions under it. But the decision that a corporation is subject to the provisions seems applicable at present.[2] It is true that in the former law the word "person" is used, while here the phrase is "a bankrupt may;" but in definition 4 of § 1 a bankrupt is declared to be a person by or against whom a petition has been filed, etc., so that this difference is not significant, as "persons" includes corporations (§ 1, (19)). The present act does not expressly refuse a discharge to corporations, while the last one did, so that the argument is stronger for allowing a corporation the benefit of composition proceedings under this act than under the old law.[3]

A form of petition for a meeting of creditors to consider a composition has been provided by the Supreme Court.[4]

The majority in number and amount is to be determined by the amount of claims which have been allowed. This does away with the provisions of the act of 1874 relating to the method of determining the value and amount of claims, and the right of secured creditors to vote at composition meetings. Secured creditors may file a claim for any deficiency over and above their security (§ 57 *h*), and may vote on this amount (§ 56 *b*–§ 57 *e*). In computing the number and amount of claims, only the deficiency over the security held is to be taken into account (§ 56 *b*).

The judge has the right to designate any place for the deposit of the money. The forms indicate that one of the designated depositaries (§ 61) will be chosen,[5] but the judge will have the power to disregard this if he chooses.

The application for a confirmation of a composition should set up the facts mentioned in clause *b* as conditions precedent to the filing of the application. A form has been prescribed.[6]

[1] Re Scott, 15 N. B. R. 73, Fed Cas. No. 12,519.

[2] Re Weber Furniture Co., 13 N. B. R. 529, Fed. Cas. No. 17,330.

[3] Re Weber Furniture Co., 13 N. B. R. 529, Fed. Cas. 17,330.

[4] Form 60.

[5] See Form 61.

[6] Form 61.

Creditors must be given ten days' notice by mail of the hearing (§ 58 *a*, (2)). The court may order the bankrupt to appear and submit to examination (§ 7, (9)); but as a composition is not to be filed in court till after an examination of the bankrupt, it would seem the examination might be concluded at the first meeting of the creditors (§ 7, (1); § 55 *b*), though the court could undoubtedly order another examination if necessary.

The judge shall hear an application for the confirmation of a composition, but he may refer it or any issue arising out of it to the referee to ascertain the facts.[1] Under the Act of 1867,[2] the creditors of a bankrupt were required to appear at a day fixed and show cause against the granting of a discharge. Rule XXXII. evidently contemplates that a similar method of procedure will be adopted under this act with regard to both compositions and discharges. The proper practice under this rule would be to appoint a day when creditors should show cause and a later day for the hearing. The rule provides that the creditor shall appear on the day set for showing cause, and within ten days thereafter shall file a specification of the grounds of his opposition.[3] No form is provided for the specification of the ground of opposition to the confirmation of a composition, but it would be the better practice to file a written specification, since the rule requires it.

The former statute contained a provision like clause 1 of paragraph *d*. It was held that it was not wholly a question whether the debtor might have offered a larger dividend, but whether the creditors were wise in taking what was offered.[4] In England the court will scrutinize a composition carefully, and will not confirm it unless satisfied that it will be advantageous to creditors.[5] Where a partner offered terms of composition which were satisfactory to his separate creditors who alone were interested, it was confirmed though the joint creditors objected.[6]

[1] Rule XII. (3).
[2] § 29, 14 Stats. 531, R. S. § 5109.
[3] See *infra*, § 477.
[4] Ex parte Jewett, 11 N. B. R. 443, Fed. Cas. No. 7303.
[5] Re Burr, 9 Morrell, 133.
[6] Re Ridgway, 8 Morrell, 289.

The acts which disqualify a bankrupt from receiving a discharge are concealment of property from his trustee, making a false oath, or fraudulently destroying, concealing, or failing to keep books of account (§ 14). If he has been guilty of any of these acts, the judge under the provisions of paragraph *d* (2) must refuse to confirm the composition.

Clause 3 of paragraph *d* is intended to guard against the danger of a creditor refusing to sign a composition unless he is given a greater proportion than the others. This is made a crime punishable by two years' imprisonment (§ 29 *b* (5)).

The terms of the order confirming a composition are stated in Form 62.

A composition when confirmed releases the debtor from all debts barred by a discharge except those which were contained in the composition (§ 14 *c*).

The composition must provide for the payment of a *pro rata* amount on all the debts of the bankrupt. This is not required by the act except by inference from the phraseology of paragraph *b* that there shall be deposited "the consideration to be paid by the bankrupt to his creditors," but it is a necessary part of a composition law, as otherwise the debts of some creditors would be discharged and others not. This is always the rule in composition proceedings.[1]

Under the Act of 1869 in England and the composition act in this country the debts of creditors whose names had been omitted from the list filed by a debtor were not discharged.[2] This will be the law under the present act, since the confirmation of a composition does not release debts not affected by a discharge (§ 14 *c*). Creditors whose debts have not been scheduled are not affected by a discharge unless they had knowledge of the proceedings (§ 17 (3)).

The rule that when a composition is confirmed all debts are

[1] Act of June 22, 1874, § 17, 18 Stats. 182; Re Trafton, 14 N. B. R. 507, Fed. Cas. No. 14,133; Drake *v.* McQuade, 66 N. H. 303.

[2] Robson, Bankruptcy, 7th ed. 757; Re Trafton, 14 N. B. R. 507, Fed. Cas. No. 14,133; Re Becket, 2 Woods, 173, Fed. Cas. No. 1210. See Liebke *v.* Thomas, 116 U. S. 605.

released except those not affected by a discharge is a usual one in composition proceedings.[1]

The consideration is to be distributed as the judge directs if the composition is confirmed (§ 12 *e*). It is difficult to understand exactly what is meant by this provision. It cannot mean that the judge has any discretion as to the amount to be paid or as to the order of payment. It probably means that the judge shall direct by whom the payments shall be made. Some compositions may be offered before any trustee is appointed, so that in these cases the clerk or the referee or the judge himself will have to pay out the money which is on deposit. The judge can decide who shall do this. Form 63 contemplates that this should be done by the clerk but the judge might undoubtedly authorize some one else to do it. Possibly the court might appoint a person to distribute the funds.[2]

The cases which have arisen on the failure to carry out a composition will not be likely to be repeated under this act except in the exceptional case of a debtor's depositing an insufficient amount. If the composition is not confirmed, bankruptcy proceedings will be resumed (§ 12 *e*).[3]

§ 476. **Act of 1898.**—Sec. 13. Compositions, when Set Aside. — *a*. The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practised in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

This is substantially the same as the proceedings to revoke a discharge, and similar questions will arise in regard to it.[4]

[1] Wilmot *v.* Mudge, 103 U. S. 217; Bayly *v.* University, 106 U. S. 11; Re Croom (1891), 1 Ch. 695.

[2] See Ex parte Hamlin, 16 N. B. R. 320, 323, Fed. Cas. No. 5993.

[3] See Re Pinfold (1892), 1 Q. B. 73.

[4] See *infra*, § 478.

The act does not require that notice should be given to creditors, but it would seem to be the better practice to give notice.[1] If any creditor was a party to the alleged fraud he at any rate should be notified.

The act provides for a jury trial on the question of the revocation of a composition.[2]

A composition will not be set aside because a creditor was not notified.[3]

§ 477. **Act of 1898.** — SEC. 14. DISCHARGES, WHEN GRANTED.— *a.* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b. The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offence punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.

[1] Ex parte Hamlin, 16 N. B. R. 320, Fed. Cas. No. 5993; Re Dunn, 53 Fed. Rep. 341.

[2] See *infra*, § 482.

[3] Re Rudnick, 1 N. B. N. 276.

c. The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

Congress has endeavored throughout this act to provide that estates shall be settled as quickly as possible[1] and has accordingly enacted that no debtor under any circumstances shall be granted a discharge if he fails to apply for it within eighteen months.

Section 14 differs from many laws relating to discharges by not requiring the assent of creditors.[2] It is also peculiar in the fact that there is nothing in the act which refuses a discharge to corporations which were formerly excepted from such provisions.[3]

It would seem extremely doubtful whether a corporation can be granted a discharge. A discharge is granted to a bankrupt so that he may not be harassed all his life by his old creditors without power to retrieve his standing. It is supposed that a debtor who is freed from his old debts may start afresh and become a valuable member of society.[4] There is no such reason for freeing a corporation from its liabilities. It appears from a consideration of the disqualifications as expressed in § 14 that Congress intended only natural persons to be subject to a discharge.

The petition for a discharge must state briefly the proceedings in the case and the acts of the bankrupt done under the orders of the court or imposed on him by the act.[5] The form prescribed[6] seems hardly to comply with the terms of this rule, but it may be taken as the expression of the Supreme Court as to what is necessary under it.

Notice of the hearing on the discharge is to be published and the creditors are to be given notice by mail.[7] They are

[1] See *infra*, § 529.
[2] *Supra*, § 460.
[3] *Supra*, § 457.
[4] See *supra*, § 423.
[5] Rule XXXI.
[6] Form 57.
[7] Ib.

entitled to ten days' notice.[1] In this instance, the notice is given by the clerk.[2]

The judge only is to pass on the application for a discharge, but he may refer it to the referee to report on the facts relating to the whole matter or any specified part of it.[3] The judge will not consider the evidence, but will refer it to the referee to report on.[4] We have already seen[5] that it is the better practice in case of compositions to set a day on which the creditors may appear and a further day for the hearing. The rule is the same with regard to discharges.[6] The creditors must file specifications of their reasons for opposing the discharge within ten days after the day set for appearance.[7]

There was a conflict of authority under the late law whether a creditor who had not proved his debt was entitled to be heard in opposition to the bankrupt's discharge.[8] The phrase "parties in interest" in this section and sections 13 and 15 would include such a creditor if he had a provable debt which would be affected by the discharge, because his right of action against the debtor would be destroyed by the discharge. Such a creditor would be entitled to notice of the hearing (§ 58 *a* (2)), as the word "creditor" means any one owning a provable claim (§ 1 (9). The expression seems broad enough to cover any one whose rights would be in any way affected by the discharge.

The acts which prevent a discharge being granted are much fewer than under the last law. They are (1) offences punishable by imprisonment and (2) fraudulent destruction or concealment of books, or fraudulent neglect to keep them, if done in contemplation of bankruptcy. The offences above referred to are the concealment of property from the trustee and making a false oath in relation to a bankruptcy proceeding (§ 29 *b* (1) and (2)).

The last disqualification was contained in Revised Statutes,

[1] Act of 1898, § 58
[2] Form 57.
[3] Rule XII. (3).
[4] Re Wolfstein, 1 N. B. N. 202.
[5] *Supra*, § 474.
[6] Rule XXXII
[7] Ib.
[8] *Supra*, § 462.

§ 5110,[1] and the concealing of property was a reason for refusing a discharge also. The Act of 1867 provided that the destruction or falsification of books with intent to defraud creditors should be a disqualification,[2] and also the neglect by a merchant or tradesman to keep proper books.[3]

The property must have been concealed knowingly and fraudulently (§ 29 *b* (1)). Concealing includes secreting (§ 1 (22)), and it would therefore seem that this offence would be committed if the property were secreted by hiding the legal title by fraudulent transfers.[4]

It is to be noted that the debtor is not refused a discharge unless the concealment has taken place after he is a bankrupt, which means after he has filed a petition or a petition has been filed against him (§ 1 (4)), so that decisions under the last law as to concealment which took place before bankruptcy are not in point.

It is a concealment of property to leave out of the schedule property which has been conveyed in fraud of creditors.[5] The act of concealment will be committed at the time he omits the property from his schedule. In the case of an involuntary bankrupt this will be after he has been adjudged a bankrupt, but a voluntary bankrupt must file the schedule with his petition (§ 7 *a* (8)). The latter would not seem to come within the terms of § 29 *b* (1).

A false oath may have been given by a bankrupt at any time during the proceedings; for instance, in relation to the schedule. This is the same disqualification as that provided by Revised Statutes, § 5110,[6] which enumerated the occasions on which if a false oath was taken it would be a bar. The oath must be wilfully and knowingly false.[7]

The neglect to keep books mentioned in § 14 *b* (2) is a different thing from the failure of a merchant to keep proper

[1] Formerly § 29 of the Act of 1867, 14 Stats. 531.

[2] Ib.

[3] § 29, 14 Stats. 531, R. S. § 5110.

[4] *Supra*, § 35.

[5] Re Rathbone, 1 N. B. R. 536, Fed. Cas. No. 11,583; Re Hill, 1 N. B. R. 431, Fed. Cas. No. 6483.

[6] Formerly § 29 of the Act of 1867, 14 Stats. 531.

[7] Re Beardsley, 1 N. B. R. 304. Fed. Cas. No. 1183; Re Wyatt, 2 N. B. R. 288, Fed. Cas. No. 18,106; De Martin *v.* De Martin, 85 Cal. 76.

books of account, which was formerly a reason for refusing a discharge. Here the gravamen of the offence consists in the fraudulent intent. It would seem also that it would be necessary to prove that the act was done in contemplation of a proceeding under the bankrupt act.[1] The word bankruptcy means more than insolvency.[2] The other two grounds for disqualification relate, as we have seen, to acts done after the person was bankrupt, and consist not of a fraud on the creditors so much as a fraud on the administration of the act. This offence should be given a similar construction. This disqualification relates to all persons and not merely tradesmen. The questions which arose under the last act as to who were tradesmen[3] do not therefore arise now.

A mutilation or falsification of books with fraudulent intent will defeat a discharge (§ 1 (22)).

Though the assent of creditors is not necessary, it seems that any payment or security given to a creditor in order to enable the bankrupt to get a discharge would invalidate it.[4] This might be done by bribing a creditor to conceal some wrongful act of the bankrupt known to him, such as the commission of an offence.

It is not a sufficient reason for opposing a discharge that the bankrupt owed debts created by fraud, because such debts are not affected by the discharge.[5]

A creditor who opposes a discharge or a composition must file a specification in writing of the grounds of his opposition.[6] The specification must be explicit, so as to give the bankrupt the opportunity to meet the case presented against his discharge.[7] It may be amended.[8] The form is prescribed by the Supreme Court.[9] The burden of proof lies on the creditors.[10]

[1] Re Holtz, 1 N. B. N. 204; Re Stark, 1 N. B. N. 232; Re Polakoff, 1 N. B. N. 232.

[2] *Supra*, § 69; Re Boasberg, 1 N. B. N. 133.

[3] *Supra*, § 461.

[4] *Supra*, § 105.

[5] Re McEachran, 82 Cal. 219; Dyer *v.* Bradley, 89 Cal. 557; Siegel *v.* His Creditors, 95 Cal. 409; Re Thomas, 92 Fed. Rep. 912.

[6] Rule XXXII.

[7] Re Smith, 5 N. B. R. 20, Fed. Cas. No. 12,985; Re Carrier, 47 Fed. Rep. 438; Re White, 1 N. B. N. 202.

[8] Re Burk, 3 N. B. R. 296, Fed. Cas. No. 2156.

[9] Form 58.

[10] Re Boasberg, 1 N. B. N. 133.

Form 59 prescribes the terms of the order of discharge when one is granted to a bankrupt.

It has been ruled in some districts that a discharge will be refused a voluntary debtor applying *in forma pauperis*, if he can not pay the costs of the court officers.[1]

If the objections to a discharge are frivolous and vexatious, the objecting creditor may be required to pay costs.[2]

§ 478. **Act of 1898.** — SEC. 15. DISCHARGES, WHEN REVOKED. — *a.* The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

It was generally held under Revised Statutes, § 5120,[3] that a discharge could be revoked not only on the ground that the debtor had fraudulently obtained it, but because he had been guilty of some act which would have prevented a discharge.[4] The phraseology of the present section is different, and it seems, especially in view of the closing words of the section, that the only ground for revoking a discharge is that it was obtained through the fraud of the bankrupt. The application must be brought within a year.

Even though the discharge has been fraudulently obtained it cannot be revoked unless the bankrupt has done an act which would prevent a discharge. This fact shows that the fraud intended by this section means a fraud by which some of the disqualifications for a discharge are concealed.

[1] See 1 N. B. N. 48,132. But see Re Langdon, Fowler & Co., 1 N. B. N. 232.

[2] Re Wolpert, 1 N. B. N. 238.

[3] Act of 1867, § 34, 14 Stats. 533.

[4] *Supra*, § 425.

There must be a trial by jury on the question of the revocation of a discharge.[1]

"Parties in interest" in this and the preceding sections includes all persons whose interests are affected by the discharge. It is apparent, however, from the terms of the section that one who acquires rights after the discharge has no standing to apply for a revocation.[2]

The application must be filed within a year by a person not guilty of laches. As to what delay will amount to laches, each case will depend on its own circumstances and no general rule can be laid down, but the courts, in view of the evident intent of Congress to expedite as much as possible the settling of estates, will probably adopt a strict interpretation of the section.[3]

A debtor might obtain a discharge by fraudulently concealing the fact that he has done some of the things which disqualify him. It would be a fraud if he bribed a creditor to conceal such an act. If the person applying for the revocation of the discharge knew of the fraud before the discharge was granted the court will not revoke it. This was the law under the Act of 1867[4] and in some states.[5] It would be an easy matter, however, for the person desiring a revocation of the discharge to tell some creditor not disqualified by knowledge of the fraud. The latter could then petition.

The circuit court has no jurisdiction over the matter of discharges.[6]

§ 479. **Act of 1898.**— SEC. 16. CO-DEBTORS OF BANKRUPTS.— *a.* The liability of a person who is co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

This is the rule whether mentioned in the statute or not, since the discharge is personal to the bankrupt.[7] It does not

[1] See *infra*, § 482.

[2] See Sanborn *v.* Doe, 92 Cal. 152; Wright *v.* Worthley, 84 Maine, 182.

[3] See Cook *v.* Barrett, 155 Mass. 413.

[4] § 34, 14 Stats. 533, R. S. § 5120.

[5] Blake *v.* Clary, 83 Maine, 154; Goodwin *v.* Selby, 77 Md. 444.

[6] Commercial Bk. *v.* Buckner, 20 How. 108.

[7] *Supra*, § 458.

depend on whether the creditor filed his proof or not.[1] Sureties on a bond to dissolve an attachment are included in this rule.[2] The court may allow a judgment to proceed against a discharged bankrupt to determine the liability of such sureties.[3] In such a case it will protect the principal debtor by granting a stay of execution against him.[3] Where the stockholders of a corporation are subject to liability for the corporate debts up to the amount of their stock, a discharge of the corporation does not relieve them of this liability.[4] This question may arise if corporations are held to be entitled to a discharge under this act like natural persons.[5]

An interesting question arises whether a person will be liable as a surety for his partner who has been discharged from firm debts. The former law included partners by name in the section relating to the liability of co-debtors.[6] The separate estate of a partner is liable to joint creditors after the separate creditors have been paid.[7] It seems clear therefore that Congress intended that a partner should still be liable for firm debts when his co-partner had been discharged from them, as otherwise an established principle of the law relating to bankruptcy of partners would be changed without an express indication of the intention to change it. The mercantile view of a partnership is that partners are sureties for the firm,[8] and the framers of the act very likely had this in mind when they used the expression "in any manner a surety for."

The rule of § 16 applies as well to composition proceedings. The confirmation of a composition does not release co-debtors.[9]

§ 480. **Act of 1898.**—SEC. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—*a.* A discharge in bankruptcy shall

[1] Schott *v.* Youree, 142 Ill. 233.

[2] Bernheimer *v.* Charak, 170 Mass. 179; White *v.* McCaughey, 37 Atl. Rep. 850 (R. I.).

[3] Hill *v.* Harding, 130 U. S. 699.

[4] Willis *v.* Mabon, 48 Minn. 140.

[5] *Supra*, § 477.

[6] Act of 1867, § 33, 14 Stats. 532; R. S. § 5118; Re Downing, 3 N. B. R. 748, Fed. Cas. No. 4044.

[7] *Supra*, § 135.

[8] See Bankruptcy of Partners, 19 Am. Law Rev. 32.

[9] Mason & Hamlin Organ Co. *v.* Bancroft, 1 Abb. N. C. 415; Robson, Bankruptcy, 7th ed. 755; Ex parte Jacobs, L. R. 10 Ch. 211.

release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

All provable debts are discharged except those enumerated, so that if a debt be provable which does not come within one of the exceptions it will be discharged. And so of collateral undertakings connected with a provable debt [1] and costs and expenses connected with it.[2] See sections 441 *et seq.* as to what other debts are not discharged.

Debts due the sovereign were not discharged,[3] and this clause has extended the exemption as far as it relates to taxes.

The distinctions formerly taken as to whether a judgment in a suit brought for a cause of action arising out of fraud was released by a discharge [4] are done away by clause 2.

Clause 3 prevents the injustice which occurred under the former law that a creditor who had no notice of the proceedings would be barred.[5]

It might still happen, however, that a creditor whose debt

[1] *Supra*, § 437.
[2] *Supra*, § 440.
[3] *Supra*, § 439.
[4] *Supra*, § 435.
[5] *Supra*, § 459. Re Archenbrown, 11 N. R. R. 149, Fed. Cas. No. 504; Lamb *v.* Brown, 12 N. B. R. 522, Fed. Cas. No. 8011; Symonds *v.* Barnes, 59 Maine, 191; Payne *v.* Able, 7 Bush, 344; Pattison *v.* Wilbur, 12 N. B. R. 193; Williams *v.* Butcher, 12 N. B. R. 143; Platt *v.* Parker, 13 N. B. R. 14; Thurmond *v.* Andrews, 13 N. B. R. 157; Heard *v.* Arnold, 15 N. B. R. 543; Fuller *v.* Pease, 144 Mass. 390; Heim *v.* Chapman, 171 Mass. 347.

was duly scheduled was not notified. This clause would not apply to such a case and would give such a person no remedy.

Under the composition law passed in 1874[1] there was a provision similar to that of clause 3.

Clause 4 is substantially the same as § 5117 of the Revised Statutes[2] except that the word "misappropriation" is added.

Debts created by fraud are excepted, and this means actual fraudulent intent.[3] There must be fraud at the time the debt is created.[4]

The words "fiduciary capacity" have been given a somewhat limited construction by the Supreme Court of the United States. The decisions seem to depend on the terms of the Act of 1841,[5] which used the words "executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." It is held that factors and other persons acting in a quasi fiduciary capacity are not within the terms of the act.[6] Such decisions would seem to be binding, as the words in this statute are the same as those of the Revised Statutes.

As to defalcations by a public officer see *supra*, § 434.

[1] Act of June 22, 1874, Ch. 390, § 17, 18 Stats. 182.

[2] Formerly § 33 of the Act of 1867, 14 Stats. 533.

[3] *Supra*, § 433.

[4] Ib. Re Blumberg, 1 N. B. N. 258.

[5] § 1, 5 Stats. 440.

[6] *Supra*, § 431.

CHAPTER IV.

COURTS AND PROCEDURE THEREIN.

§ 481. **Act of 1898.** — SEC. 18. PROCESS, PLEADINGS, AND ADJUDICATIONS. — *a.* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States.

b. The bankrupt, or any creditor, may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow.

c. All pleadings setting up matters of fact shall be verified under oath.

d. If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in

cases where a jury trial is given by this Act, and make the adjudication or dismiss the petition.

e. If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

f. If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

g. Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

The procedure established by this act is quite different from that under the last law, especially in the circumstance that the marshal is regularly given possession of the estate only in one instance.[1]

The petition should clearly allege the facts which give the court jurisdiction and the act of bankruptcy relied on.[2] It must be under oath. The oath must be made by the creditors themselves, but objection to a petition sworn to by an attorney is waived by answer.[3] The petition must be written or printed plainly, without abbreviation or interlineation except for the purpose of reference.[4] Amendments may be allowed on application to the court. They must be written out plainly and

[1] See *supra*, § 466.
[2] *Supra*, § 48.
[3] Re Simonson, 92 Fed. Rep. 904, 1 N. B. N. 230.
[4] Rule V.

verified by oath. The application shall state why the error was made in the original paper.[1] The form of the petition is prescribed by the Supreme Court.[2]

The petition is to be served on the debtor with a writ of subpœna, the form of which is prescribed by Form 5. The debtor is notified to appear before the court at a day named to show cause why he should not be declared bankrupt.[3]

As to the service of the subpœna see 1 Foster Federal Practice, 2d ed. §§ 91 *et seq.*

For a further discussion of the requirements of the petition see *infra*, § 521.

Any creditor may appear and plead. There is nothing in the act which would prevent any one having a provable claim (§ 1, (9)) from pleading, though he were a secured creditor or one who had been given a preference. And any person whose rights would be affected should be allowed to appear and plead,[4] but by the terms of clause *b* and § 59 *f* it seems that only creditors (defined in the act to be persons having provable claims) would be allowed to be heard. The petitioning creditors and the debtor can not by agreement extend the time for answer without leave of court.[5]

A bankrupt or a creditor may himself conduct the proceedings but the creditor can conduct only his own case and can not appear for others.[6] A party may appear by attorney, who must be authorized to practice before the circuit or district court.[7] The clerk must keep a docket open to the public on which are to be recorded the minutes of the proceedings.[8] The names of the attorneys shall be entered on the docket.[9] All papers filed are to be endorsed with a brief statement of their character[10] and the time of filing noted by the clerk or referee.[11] Notices and orders may be served on attorneys except when otherwise required by the act.[12] Process, summons, and

[1] Rule XI.
[2] See Forms 1, 2, and 3.
[3] Form 4.
[4] *Supra*, § 53.
[5] Re Simonson, 92 Fed. Rep. 904, 1 N. B. N. 230.
[6] Rule IV.
[7] Ib. See *supra*, § 465.
[8] Rule I.
[9] Rule V.
[10] Ib.
[11] Rule II.
[12] Rule V.

subpœnas must be under seal of the court, tested by the clerk.[1]

The court has power to dismiss a petition even if an act of bankruptcy has been committed, if there are equitable reasons for so doing;[2] but it would seem that § 59 *g* requires that creditors should be notified, though that section does not relate to this precise case.

The court is to hear the petition as soon as may be without a jury unless the bankrupt claims one. Undoubtedly there would be power to adjourn the hearing from time to time.[3]

The form of an adjudication of bankruptcy, or of an order dismissing the petition, is prescribed in Forms 12 and 11.

If there is no dispute over an involuntary petition, it would seem that the only thing for the judge to decide is whether the court has jurisdiction and the petition is in proper form. And so in the case of a voluntary petition. This was the rule under the former law in the case of a voluntary petition.[4] And this act does not contemplate that in case of a voluntary petition there shall be any chance for creditors to be heard except when the petitioner himself wishes to withdraw the petition, or it is to be dismissed by consent or for want of prosecution (§ 59 *g*). In England the petition will be dismissed if the petitioning creditor does not appear on the day set for the hearing.[5]

A form for order of reference by the clerk is prescribed by the Supreme Court.[6]

§ 482. **Act of 1898.**—SEC. 19. JURY TRIALS.—*a.* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a

[1] Rule III.
[2] *Supra*, § 58.
[3] Re Thurlow (1895), 1 Q. B. 724.
[4] Re Fowler, 1 N. B. N. 680, Fed. Cas. No. 4998.
[5] Re Stockley, 10 Morrell, 131.
[6] Form 15.

written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

b. If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

c. The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

All issues of fact in bankruptcy proceedings in the district and circuit courts shall be tried by a jury, except as otherwise provided in the bankrupt act.[1] A trial by jury in the circuit court may be waived,[2] but there is no similar provision with regard to trials in the district court.[3] A trial may be waived by both parties, however, if they agree on a statement of facts.[4] If the case is determined in the district court by a jury or on agreed facts, there can be a review by writ of error in a higher court.[5] It is competent for the parties to an action in the

[1] Rev. Stats. §§ 566, 648.

[2] Rev. Stats. § 649.

[3] Blair *v.* Allen, 3 Dill. 101, Fed. Cas. No. 1483; Lyons *v.* Nat. Bank, 19 Blatch. 279; Rogers *v.* United States, 141 U. S. 548, 554.

[4] Campbell *v.* Boyreau, 21 How. 223; Supervisors *v.* Kennicott, 103 U. S. 554, 556; Henderson's Spirits, 14 Wall. 44, 53.

[5] See cases cited in note 4, *ante*, and Blair *v.* Allen, 3 Dill. 101; Fed. Cas. No. 1483; Lyons *v.* Nat. Bank, 19 Blatch. 279.

district court to waive a trial by jury, and a judgment of the court under such circumstances will be binding on them;[1] but there can be no review of the action of the court by writ of error.[2]

A jury trial may be had except when otherwise provided in this act.[3] In parts of the act it is evidently contemplated that there shall be a determination of the issue by a jury. It is provided that a composition or a discharge shall be set aside on a trial under certain circumstances (§§ 13 and 15). The clause as to confirming a composition provides for a hearing (§ 12 *c*), and that as to granting a discharge provides that the judge shall hear the application and any proofs and pleas in opposition (§ 14 *b*). In these sections of the act which come so closely together, the word "trial" is used as contrasted with "hearing." The first refers to a trial by jury, and the second to a determination by a judge.[4] It is true that in § 4 of the present act the word "trial" does not mean a trial by jury,[5] but that is because the usual meaning of the word is controlled by other parts of the act which show that a debtor is not to have a trial by jury unless he claims it. But it is the evident intention of Congress that a debtor who has been granted his discharge, or whose offer of composition has been confirmed, shall have the right to submit to a jury the question of revocation of the discharge or composition.

The district court is the only court which has jurisdiction of compositions and discharges.[6] Under the authority of the cases cited above, it would appear that the question of setting aside a composition or revoking a discharge must be tried before a

[1] Kearney *v.* Case, 12 Wall. 275, 281, and cases.

[2] Minor *v.* Tillotson, 2 How. 392; Prentice *v.* Zane, 8 How. 470; Guild *v.* Frontin, 18 How. 135; Kelsey *v.* Forsyth, 21 How. 85; Campbell *v.* Boyreau, 21 How. 223; Flanders *v.* Tweed, 9 Wall. 425; Kearney *v.* Case, 12 Wall. 275; Rogers *v.* United States, 141 U. S. 548, and cases cited at page 556; Perego *v.* Dodge, 163 U. S. 160, 166.

[3] Rev. Stats. §§ 566, 648.

[4] See Galpin *v.* Critchlow, 112 Mass. 339, and Ins. Co. *v.* Dunn, 19 Wall. 214, for the construction of an act where these words were used in a similar way. Also Gordon *v.* Scott, 2 N. B. R. 86, Fed. Cas. No. 5620; United States *v.* Curtis, 4 Mason, 232, Fed. Cas. No. 14,905; Minnett *v.* Milwaukee & St. Paul Ry., 3 Dill. 460, Fed. Cas. No. 9636.

[5] *Supra*, § 466.

[6] *Infra*, § 486.

jury unless all the parties waive a jury trial and ask for the determination of the court on an agreed statement of facts, or unless they are willing to submit to the decision of the district court without appeal.

A jury trial may be had on an involuntary petition if asked for within ten days of the return day,[1] otherwise the judge will determine the questions arising on it.[2] The debtor must file a claim for a jury trial, and the court will then order it.[3]

Offences must be tried by a jury, since they are punishments for crimes,[4] but a punishment for contempt of court need not be so tried, as it is a civil proceeding.[5]

§ 483. **Act of 1898.** — SEC. 20. OATHS, AFFIRMATIONS. — *a.* Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

b. Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

Oaths in similar cases under the former act were first required to be taken before a district judge or register or a commissioner of the circuit court,[6] but this was afterward extended to notaries public.[7]

§ 484. **Act of 1898.** — SEC. 21. EVIDENCE. — *a.* A court of bankruptcy may, upon application of any

[1] See Bray *v.* Cobb, 91 Fed. Rep. 102.
[2] Act of 1898, § 18 *d*.
[3] Forms 6 and 7.
[4] *Supra*, § 6. See Act of 1898, § 2 (4).
[5] Hendryx *v.* Fitzpatrick, 19 Fed. Rep. 810; Cooley, Constitutional Limitations, 6th ed. 389, note 2.
[6] Act of 1867, §§ 11, 22, 14 Stats. 521, 527, Rev. Stats. §§ 5017, 5079,
[7] Stats. 1874, c. 390, § 20, 18 Stat. 186; Stats. 1876, c. 304, 19 Stat. 206; Re Bailey, 15 N. B. R. 48, Fed. Cas. No. 727.

officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the State in which the proceedings are pending, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act.

b. The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

c. Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

d. Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

e. A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

f. A certified copy of an order confirming or setting

aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

***g.* A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.**

This is a power given to the court in addition to the power to summon witnesses.[1]

The bankrupt cannot be examined before the adjudication,[2] because before that time the estate is not in process of administration; and so of any other person. An examination of a bankrupt may be ordered at any time after the adjudication.[3] The trustee may be examined,[4] and the bankrupt should have the right to examine.[5]

Clause *a* is in substance like §§ 5086 and 5087 of the Revised Statutes,[6] except that it provides for examination before the judge of a state court, and applies only to persons who are competent witnesses under the state law. As to the scope of the examination and the persons subject to it see *supra*, §§ 142 *et seq.* It has been held that the bankrupt's wife may be examined.[7] Such was the rule under the last law,[8] but it is not so now in the district court in any state when the wife is not a competent witness.[9]

Witnesses are to be examined before the referee by a party or his attorney in the same manner as in courts of law. The deposition is to be drawn up under the direction of the referee and signed by the witness in the referee's presence. It is to

[1] *Supra*, § 142.
[2] *Supra*, § 144.
[3] Re Price, 1 N. B. N. 131.
[4] *Supra*, § 148.
[5] *Supra*, § 150.
[6] Formerly Act of 1867, § 26, 14 Stats. 529.
[7] Re Foerst, 93 Fed. Rep. 190, 1 N. B. N. 258.
[8] *Supra*, § 142.
[9] Re Fowler, 93 Fed. Rep. 417, 1 N. B. N. 265.

be taken down in the form of narrative, unless the referee thinks it ought to be by question and answer. The referee is to note any objections to questions with his decisions thereon. The court may impose costs for immaterial depositions.[1] An imprisoned debtor may be brought before the court for examination.[2] The referee may authorize the employment of a stenographer.[3] The order for examination of the bankrupt and the summons for witnesses should be in the form prescribed by the Supreme Court.[4]

There is nothing in the act or in the rules of the Supreme Court which requires the examination of the bankrupt to be conducted before the referee personally.[5] Rule XXII. applies only to witnesses. As a practical matter the bankrupt's examination will usually be held at some place which is convenient for the parties, but not before the referee. The oath should be administered by the referee at the first meeting, and the bankrupt should sign before the referee, or the referee should at least sign the examination.[6]

As to depositions see 1 Garland & Ralston, Federal Practice, p. 569 *et seq.*, and p. 692 *et seq.*

The referee is to approve the bond of a trustee.[7] Bonds of trustees are to be filed of record in the clerk's office of the district court (§ 50 *h*), but it is evident that the record spoken of in clause *e* is that under the statutes of the states requiring deeds to be recorded. It was the duty of an assignee under the last law to record his assignment in the registry of deeds.[8]

The title of a trustee can be collaterally impeached only on the ground that he was appointed under an unconstitutional law or that the court did not have jurisdiction.[9]

It has been held that a state has the power to make an assignment conclusive evidence of the assignee's right to sue,[10] and there is no doubt that Congress has the same power.

[1] Rule XXII.
[2] Rule XXX.
[3] Act of 1898, § 38 (5).
[4] Forms 28, 30.
[5] Re Warszawiak, 1 N. B. N. 135.
[6] See Form 29.
[7] Form 26.
[8] Act of 1867, § 14, 14 Stats. 522 R. S. § 5054.
[9] *Supra*, § 294.
[10] Fitzgerald *v.* Neustadt, 91 Cal. 600.

There is nothing in paragraph *f* which provides that a discharge shall be conclusive, but it is the general rule in this country that a discharge cannot be collaterally attacked,[1] and such a rule is necessary to the successful operation of a bankrupt law.[2] Notwithstanding that the provision here is different from that under § 5119 of the Revised Statutes,[3] where the discharge was made conclusive, it should be held that a discharge cannot be collaterally attacked, except for want of jurisdiction in the court which granted it.

As to the order for discharge or confirmation of composition see Forms 59, 62.

There is no provision in paragraph *g* which relates to the effect of a discharge in revesting property in a bankrupt. Probably a similar rule should be applied to this case as to that of a confirmation of a composition. There was no provision in the last law for a transfer to the bankrupt after his discharge, but the title revested in the bankrupt after the estate was wound up.[4]

The property will not revert to the bankrupt after the composition proceedings are begun till their confirmation.[5]

§ 485. **Act of 1898.** — SEC. 22. REFERENCE OF CASES AFTER ADJUDICATION. — *a.* After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

[1] *Supra*, § 427.
[2] *Supra*, § 294.
[3] Formerly § 34 of the Act of 1867, 14 Stats. 533.
[4] Burton *v.* Perry, 46 Ill. 71; Steevens *v.* Earles, 25 Mich. 40.
[5] Titcomb *v.* Bradlee, 59 Mass. 190.

b. The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

When the judge refers a case to the referee the order shall set a day on which the bankrupt is to appear before the referee. After that he is to be subject to the orders of the referee.[1] Form 14 prescribes the terms of the order of reference.

§ 486. **Act of 1898.** — SEC. 23. JURISDICTION OF UNITED STATES AND STATE COURTS. — *a.* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

c. The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.

The circuit courts were given jurisdiction over controversies between assignees and adverse claimants by the acts of 1841 and 1867.[2] This jurisdiction did not extend to any proceeding

[1] Rule XII. (1).

[2] Act of 1841, § 8, 5 Stats 446; Act of 1867, § 2, 14 Stats. 518, R. S. § 4979.

in bankruptcy such as the question of granting a discharge[1] or any other matter,[2] and this is the rule now according to the express terms of this section. Suits by a trustee must be brought by an action in the proper court and can not be determined in a summary way as a part of bankruptcy proceedings.[3]

The circuit court will not have so extensive a jurisdiction as it had under the Act of 1867.[4] Section 23 may be construed in two different ways. Either it means to deprive the circuit court of the jurisdiction only which it would otherwise have over suits by the trustee as an officer appointed under a federal law,[5] or it takes away all the jurisdiction of the circuit court over questions arising under the bankrupt law. Without this provision the circuit court would have jurisdiction over such questions if the amount in controversy were two thousand dollars exclusive of interest and costs, on the ground that the controversy arose under the laws of the United States.[6] If § 23 be construed in the way first suggested its scope will be very limited, since every suit by a trustee for two thousand dollars or over will involve some question under the bankrupt law and an allegation of that fact in the declaration will give the court jurisdiction.[7] It seems a more reasonable interpretation of this section, therefore, that it deprives the circuit court of all jurisdiction which is dependent on a question of the meaning of the bankrupt law being involved.

This construction is reinforced by two considerations, one

[1] Commercial Bank *v.* Buckner, 20 How. 108.

[2] See Morgan *v.* Thornhill, 11 Wall. 65; Hall *v.* Allen, 12 Wall. 452; Mead *v.* Thompson, 15 Wall. 635; Coit *v.* Robinson, 19 Wall. 274. These cases are in point because they hold that there was a power in the circuit court to revise bankruptcy proceedings under § 2 of the Act of 1867, but no power to revise suits by an assignee against an adverse claimant. See also cases cited in § 486.

[3] Smith *v.* Mason, 14 Wall. 419; Stickney v. Wilt, 23 Wall. 150; Marshall *v.* Knox, 16 Wall. 551; Milner *v.* Meek, 95 U. S. 252; Sargent *v.* Helton, 115 U. S. 348. See Re Fowler, 1 N. B. N. 215; Re Buntrock Clothing Co., 92 Fed. Rep. 886, 1 N. B. N. 291; Re Abraham, 1 N. B. N. 281.

[4] § 2, 14 Stats. 518; R. S. § 4979.

[5] Feibelman *v.* Packard, 109 U. S. 421; Bock *v.* Perkins, 139 U. S. 628; Sonnentheil *v.* Moerlein Brewing Co., 172 U. S. 401. See Re Sievers, 91 Fed. Rep. 366, 1 N. B. N. 68.

[6] Act of Aug. 13, 1888, § 1, 25 Stats. 433.

[7] Tennessee *v.* Union & Planter's Bk. 152 U. S. 454; Borgmeyer *v.* Idler, 159 U. S. 408; Oregon Short Line *v.* Skottowe, 162 U. S. 490.

arising from the words of the section and the other from the general scope of the act. In the first place, if "bankruptcy proceedings had not been instituted" there would be no question arising under the bankrupt law and the circuit court would have no such question to pass on. The second point is that the tendency of the whole act is to confine the powers of the courts of bankruptcy within more narrow limits than former acts. Under the Act of 1867 the state courts had jurisdiction over suits by assignees though there was no provision in the act giving them this power.[1] The present law is more limited in many ways than the Act of 1867, and provides in paragraph *b* of § 23 for an extensive jurisdiction by state courts. It is clear for these reasons that Congress intended to limit the scope of the power of the circuit courts and extend that of the state courts.

The circuit courts will have jurisdiction of controversies between the trustee and an adverse claimant of all cases arising under the Constitution, laws, or treaties of the United States,[2] except questions under the bankrupt law,[3] or when the United States is a petitioner, or where there is a controversy between citizens of different states, or citizens of a state and foreign states, citizens, or subjects, or where citizens of the same state claim land under grants of different states.[2] In all of these cases except that where the United States is a petitioner the amount involved must be two thousand dollars exclusive of interest and costs in order to give the court jurisdiction.[4] The circuit courts have also jurisdiction of suits for the infringements of patents and copyrights irrespective of the amount involved.[5] Also of trade-marks used in foreign commerce or trade with the Indian tribes, if they have been registered,[6] and of suits arising under certain laws where jurisdiction is expressly given to the circuit courts.[7]

[1] Eyster *v.* Gaff, 91 U. S. 521.

[2] Act of Aug. 13, 1888, § 1, 25 Stats. 433.

[3] See *supra*.

[4] Act of Aug. 13, 1888, § 1, 25 Stats. 433; Curtis, Jurisdiction of U. S. Courts, 2d ed. p. 120.

[5] 1 Foster, Fed. Practice, 2d ed. § 15.

[6] Act of Mar. 3, 1881, 21 Stats. 502.

[7] Curtis, Jurisdiction of U. S. Courts, 2d ed. p. 163; 1 Foster Fed. Practice, 2d ed. § 15.

In those cases where the jurisdiction of the circuit court depends on there being two thousand dollars involved, it must appear from the plaintiff's bill or declaration that it is legally possible for him to recover that amount. If it is clear that the plaintiff has no legal right to recover two thousand dollars exclusive of interest and costs, the court will not have jurisdiction, but where the damages are indefinite the jurisdiction will attach.[1]

Paragraph *b* has been held to apply only to suits in circuit courts.[2] But the title of § 23 shows that the jurisdiction of district courts and state courts was also covered by the section, and paragraph *a* has treated of the jurisdiction of circuit courts. It seems, therefore, more likely that paragraph *b* relates to suits in the district courts. Section 2 (7) gives the district court power to determine controversies relating to the estates of bankrupts, "except as herein otherwise provided." Paragraph *b* of § 23 is the only other provision which relates to the jurisdiction of district courts. If we consider these two parts of the act together we shall see that by the provision of the present paragraph the trustee will have to bring certain suits in the state court, unless the defendant consents to be sued in the district court. If bankruptcy proceedings had not been begun, these suits would have had to be brought in the state court, because the district court derives all its authority from the bankrupt law, which does not attach till a proceeding under the law is commenced.

If we do not construe this paragraph as a restriction on the jurisdiction of the district court given by § 2 (7), that court will have power over all controversies between trustees and other parties,[3] and the state courts will be deprived of juris-

[1] Curtis, Jurisdiction U. S. Courts, 2d ed. p. 120 *et seq.*; Scott *v.* Donald, 165 U. S. 58; Building & Loan Assoc. *v.* Price, 169 U. S. 45; Wetmore *v.* Rymer, 169 U. S. 115; Vance *v.* Vandercook, 170 U. S. 468.

[2] Re Sievers, 91 Fed. Rep. 366, 1 N. B. N. 68. The case involved merely the decision that a receiver might be appointed to take charge of the assets after a voluntary assignment; so the opinion on the construction of § 23 *b* is a dictum. The decision was affirmed in Davis *v.* Bohle, 92 Fed. Rep. 325, 1 N. B. N. 216, without discussion of this question.

[3] Sherman *v.* Bingham, 7 N. B. R. 490, Fed. Cas. No. 12,762; Lathrop *v.* Drake, 91 U. S. 516.

diction, except in a case where the trustee chooses to resort to these courts. This result is contrary to the intent of Congress. Paragraph *a* of this section relates to the jurisdiction of circuit courts as distinguished from state courts, and paragraph *b* regulates the right of trustees to sue in all courts.

It is to be noticed that all bankruptcy proceedings, as distinguished from controversies, are to be brought in the district court, and neither the circuit courts nor the state courts will have any power over such proceedings.

It has been held in several cases that the district court is without jurisdiction over suits by a trustee, as that jurisdiction is forbidden by paragraph *b*.[1] But as such a construction of the bankrupt act will seriously interfere with its operation, it should not be adopted unless it is the inevitable result of a correct interpretation of that act. The district court is given full power in § 2 of the act to control the estate of a bankrupt. The provision of § 23 *b* should not be construed as taking away all this power.[2] Accordingly, it has been held that paragraph *b* relates only to suits which the bankrupt himself might have brought, if there had been no bankruptcy.[3] This construction gives the district court jurisdiction over all cases of voluntary assignments[4] where the bankrupt would be estopped to sue, and all preferences[5] which are valid between the parties themselves, though voidable by the trustee. It also allows the trustee to sue in the district court to prevent any intermeddling with the bankrupt's assets after the petition is filed.[6]

A learned judge has called this interpretation of paragraph *b* "strained judicial construction,"[7] and if we consider this para-

[1] Re Scott, 1 N. B. N. 138, s. c. *nom.* Mitchell *v.* McClure, 91 Fed. Rep. 621; Burnett *v.* Morris Co., 91 Fed. Rep. 365; See Re Carter, 1 N. B. N. 162.

[2] Carter *v.* Hobbs, 92 Fed. Rep. 594, 1 N. B. N. 191.

[3] Re Gutwillig, 90 Fed. Rep. 481; Re Brooks, 91 Fed. Rep. 508; Carter *v.* Hobbs, 92 Fed. Rep. 594, 1 N. B. N. 191; Re Abraham, 1 N. B. N. 281, *contra.*

[4] Re Gutwillig, 90 Fed. Rep. 481; Lea *v.* West, 91 Fed. Rep. 237; Re Smith, 92 Fed. Rep. 135; Re Abraham, 1 N. B. N. 281, *contra.*

[5] Carter *v.* Hobbs, 92 Fed. Rep. 594; 1 N. B. N. 191.

[6] Re Brooks, 91 Fed. Rep. 508.

[7] Mitchell *v.* McClure, 91 Fed. Rep. 621.

graph alone, it seems rather a limitation of its scope. But the bankrupt act must be construed as a whole and as establishing a complete system. It seems to be the intent of the act to clothe the district court with power to settle all controversies depending on bankruptcy proceedings,[1] but to preserve to the state courts the jurisdiction which they would have had if proceedings had not been taken. The trustee will still have to resort to those courts to collect all debts owing to the bankrupt, and will have to sue there on any rights of action which the bankrupt may have had.[2]

The interpretation above advocated is in accordance with the principles of statutory construction that an exception should not be so construed as to destroy a power granted before.[3] There can be no doubt that after an act of bankruptcy has been committed and a petition filed the district court has power over the bankrupt and the creditors who claim part of the estate. If the broad construction of § 23 *b* be adopted, the result would be that the trustee would have to bring all suits in the state courts. This would bring about the anomalous condition of the district court dealing with the bankrupt and his creditors, and the state court dealing with his estate.[4] Such a result would defeat the operation of the bankrupt act.[5] An interpretation of the statute which will defeat its operation is certainly not a reasonable one.

§ 487. **Act of 1898.** — SEC. 24. JURISDICTION OF APPELLATE COURTS. — *a.* The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction

[1] See Carpenter *v.* O'Connor, 16 Ohio Circ. Ct. 526.

[2] Re Brooks, 91 Fed. Rep. 508.

[3] Carter *v.* Hobbs, 92 Fed. Rep. 594; 1 N. B. N. 191, and cases cited.

[4] Lea. *v.* West, 91 Fed. Rep. 237.

[5] See Ex parte Christy, 3 How. 292; Mitchell *v.* Great Works Mfg. Co., 2 Story, 648, Fed. Cas. No. 9662; Re Fellerath, 1 N. B. N. 292.

of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

b. The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

The appellate jurisdiction under § 24 is of all controversies arising in bankruptcy proceedings. This is contrasted with the provisions of § 25, where appeals from bankruptcy proceedings alone are regulated. It is clearly indicated by § 23 that controversies arising in bankruptcy are distinguished from bankruptcy proceedings themselves. By § 24 the appellate jurisdiction of United States courts over controversies is left the same as before the act, while special provisions are introduced by § 25 for the consideration of appeals in bankruptcy proceedings.

"Courts of bankruptcy" usually means only district courts,[1] but in paragraph *a* of § 24 it seems to be used as including the circuit courts also, as they have jurisdiction over controversies arising out of bankruptcy proceedings. There is no reason to suppose that an appeal was to be allowed from the district courts only.

The appellate jurisdiction of United States courts depends on the act of March 3, 1891.[2] There is an appeal or writ of error from the circuit or district courts direct to the Supreme Court (*a*) in a case where the jurisdiction of the court is in

[1] Act of 1898, § 1 (8).

[2] 26 Stats. 826. This is the act which established the circuit courts of appeal; it is often called the Evarts Act.

issue, (*b*) from a final decree in a prize case, (*c*) from a conviction of a capital crime,[1] (*d*) in any case which involves the construction or application of the Constitution of the United States,[2] (*e*) in any case where the constitutionality of a law of the United States or the validity of a treaty is drawn in question, or (*f*) in any case where the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.[3] A controversy in bankruptcy might arise under the first or under any one of the last three provisions. Under the first provision the Supreme Court can pass only on the question of jurisdiction,[4] but in the other instances it can pass on the whole case.[5] It must appear by the record that the attention of the lower court was directed to the question on which the appeal is taken.[6]

The sixth section of the Evarts Act provides for an appeal or writ of error from the circuit or district court to the circuit court of appeals in all cases except those just mentioned.[7] The decision of the circuit court of appeals is final in all cases of diversity of citizenship,[8] in cases arising under patent laws, revenue laws and criminal law and in admiralty. In all these cases the circuit court of appeals may certify any question of law to the Supreme Court or that court may bring up the case by a writ of certiorari. In all cases which are not made final in the circuit court of appeals there can be an appeal to the Supreme Court if the matter in controversy exceeds one thousand dollars besides costs.[9]

[1] Act of March 3, 1891, as amended by Act of January 20, 1897, 29 Stats. 492.

[2] Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1.

[3] Curtis, Jurisdiction of U. S. Courts, 2d ed. 67 and 68; Penn. Ins. Co. *v.* Austin, 168 U. S. 685.

[4] Building and Loan Association *v.* Price, 169 U. S. 45.

[5] Curtis, Jurisdiction of U. S. Courts, 2d ed. 69; Horner *v.* United States, 143 U. S. 570; Carey *v.* Houston & Texas Ry., 150 U. S. 170.

[6] Cornell *v.* Green, 163 U. S. 75; Muse *v.* Arlington Hotel Co., 168 U. S. 430.

[7] Curtis, Jurisdiction U. S. Courts, 2d ed. 74.

[8] Press Pub. Co. *v.* Monroe, 164 U. S. 105; Ex parte Jones, 164 U. S. 691; Colorado Mining Co. *v.* Turck, 150 U. S. 138; Rouse *v.* Letcher, 156 U. S. 47; Gregory *v.* Van Ee, 160 U. S. 643; Carey *v.* Houston & Texas Ry., 161 U. S. 115; Rouse *v.* Hornsby, 161 U. S. 588; Sonnentheil *v.* Moerlein Brewing Co., 172 U. S. 401.

[9] Curtis, Jurisdiction U. S. Courts, 2d ed. 74, 75.

In cases in which the jurisdiction of the district or circuit court is in issue, the defeated party may appeal to the Supreme Court on the question of jurisdiction or to the circuit court of appeals on the merits.[1] He will have to choose which course he will take and will be bound by his election.[1] But in a case which involves the construction of the Constitution of the United States, if an appeal be taken to the circuit court of appeals, the right to take the case to the Supreme Court will not thereby be waived.[2]

The circuit court of appeals can certify to the Supreme Court only questions of law and can not ask for a decision on the whole record[3] or on a mixed question of law and fact.[4] The Supreme Court discourages certification of questions.[5] The writ of certiorari is not often granted by the Supreme Court, and then only in cases of great importance,[6] but there have been several instances of a successful application for this form of remedy in recent cases.[7]

There is an appeal or writ of error to the Supreme Court in cases not made final in the circuit court of appeals where there is one thousand dollars involved. It has been held that it need not appear on the pleadings that the required amount is in controversy but this fact may be proved by affidavit.[8] Copyright cases are appealable under this section.[9]

Section 7 of the act of March 3, 1891, as amended by act of February 18, 1895,[10] gives an appeal to the circuit court of appeals when the district or circuit court in a hearing in

[1] Robinson *v.* Caldwell, 165 U. S. 359; Benjamin *v.* New Orleans, 169 U. S. 161.

[2] Pullman Car Co. *v.* Central Transportation Co., 171 U. S. 138.

[3] Graver *v.* Faurot, 162 U. S. 435; Warner *v.* New Orleans, 167 U. S. 467; Cross *v.* Evans, 167 U. S. 60.

[4] United States *v.* Union Pacific R. R., 168 U. S. 505; McHenry *v.* Alford, 168 U. S. 651.

[5] Curtis, Jurisdiction U. S. Courts, 2d ed. 76; Foster Fed. Pract. 2d ed. § 476, p. 976.

[6] Curtis, Jurisdiction U. S. Courts, 2d ed. 77; Forsyth *v.* Hammond, 166 U. S. 506.

[7] Re Chetwood, Petitioner, 165 U. S. 443; Panama R. R. Co. *v.* Napier Shipping Co., 166 U. S. 280; Forsyth *v.* Hammond, 166 U. S. 506; Smith *v.* Vulcan Works, 165 U. S. 518; Re Lennon, 166 U. S. 548; Hubbard *v.* Tod, 171 U. S. 474.

[8] United States *v.* Freight Assoc., 166 U. S. 290.

[9] Press Pub. Co. *v* Monroe, 164 U. S. 105, semble.

[10] 28 Stats. 666.

equity grants or refuses an interlocutory injunction. It has been held that no appeal would lie when a receiver was appointed unless an injunction were issued also.[1] But there would probably be no appeal to the circuit court of appeals if the district court issued an injunction in a bankruptcy case, because such a proceeding is not a hearing in equity.

Under the act of March, 1891, as amended in 1897,[2] there is a writ of error to the circuit court of appeals in all criminal cases except when a capital offence has been committed. This will apply to prosecutions for the commission of offences in bankruptcy.

Appeals to the circuit court of appeals shall be allowed by a judge of the court appealed from or a judge of the court appealed to.[3] Appeals to the Supreme Court must be taken within thirty days and shall be allowed by a judge of the court appealed from or by a justice of the Supreme Court.[4] In the latter case the lower court makes a finding of facts and a finding of law, and the record consists only of these findings and the pleadings with the judgment or decree.[5] The appellant or plaintiff in error must file a bond to prosecute his appeal or writ of error.[6] This is true in cases taken up from state courts as well as federal courts.[7] Under the present act no appeal bond is required of a trustee in proceedings in federal courts.[8]

A great many suits will be brought by trustees in state courts under the provisions of this act. It is important therefore to consider when there can be a review of such cases by the Supreme Court of the United States. Revised Statutes § 709 gives the Supreme Court power to re-examine on writ of error a final judgment or decree of the highest court of a state when the validity of a treaty or a statute of, or authority exercised under, the United States is questioned and the decision is against its validity. Also when a statute of, or authority exercised under, a state is upheld, though it is contended that

[1] Highland Ave. R. R. v. Columbia Equipment Co., 168 U. S. 27. See Re Tampa R. R., 168 U. S. 583.
[2] Acts of 1897, c. 68, 29 Stats. 492.
[3] Rule XXXVI. 1.
[4] Rule XXXVI. 2.
[5] Rule XXXVI. 3.
[6] Foster, Fed. Pract. 2d ed. § 486.
[7] Ib. § 477.
[8] Act of 1898, § 25 c.

it is repugnant to the Constitution, treaties or laws of the United States. And when the decision is against a title, right, privilege or immunity specially claimed under the Constitution, statutes or treaties of the United States, or exercised under the commission or authority of the United States.

The right to examine such questions is by writ of error only, which brings up questions of law and not of fact.[1] The writ will lie in a proper case no matter how small the amount involved.[2] There must have been a final judgment or decree of the highest court of a State in which the case was cognizable.[3] A judgment or decree is not final while any judicial question remains to be determined.[4]

The writ of error brings the record of the state court before the Supreme Court. This includes the pleadings and the judgment in an action at law together with the bill of exceptions if there be one, and the pleadings, the evidence and the decree in an equity case.[5] The Supreme Court may also look at the opinion of the state court where by the local practice it is made part of the record.[6]

It must appear that the federal question was presented to the state court,[7] and if either party claimed a right, title, privilege or immunity under the United States or the Constitution, laws or treaties thereof, this must have been specifically set up.[8] The attention of the state court must have been

[1] Curtis, Jurisdiction U. S. Courts, 2d ed. 68; Egan *v.* Hart, 165 U. S. 188.

[2] Curtis, Jurisdiction U. S. Courts, 2d ed. 42; Foster, Fed. Pract. 2d ed. § 477.

[3] Great Western Tel. Co. *v.* Burnham, 162 U. S. 339; Bacon *v.* Texas, 163 U. S. 207; Clark *v.* Kansas City, 172 U. S. 334.

[4] Curtis, Jurisdiction U. S. Courts, 2d ed. 29, 93; Foster, Fed. Pract. 2d ed. § 480; California Bk. *v.* Stateler, 171 U. S. 447.

[5] Curtis, Jurisdiction U. S. Courts, 2d ed. 33.

[6] Thompson *v.* Maxwell Land Co., 168 U. S. 451.

[7] Zadig *v.* Baldwin, 166 U. S. 485; California Bk. *v.* Kennedy, 167 U. S. 362; Columbia Water Power Co. *v.* Street Ry. Co., 172 U. S. 475.

[8] Chicago & N. W. Ry. *v.* Chicago, 164 U. S. 454; Oxley Stave Co. *v.* Butler County, 166 U. S. 648; Levy *v.* Superior Court, 167 U. S. 175; Mutual Life Ins. Co. *v.* Kirchoff, 169 U. S. 103; Backus *v.* Fort Street Co., 169 U. S. 557; C. B. & Q. R. R. *v.* Nebraska, 170 U. S. 57; Kipley *v.* Illinois, 170 U. S. 182; Green Bay Co. *v.* Patten Paper Co., 172 U. S. 58; Pittsburgh, &c. Ry. *v.* Loan & Trust Co., 172 U. S. 493.

directed to the question in time for the court to consider it before rendering its decision.[1] It is not sufficient to set up such a question in a motion for a new trial or a petition for a rehearing,[2] except in a statutory proceeding where there was no provision for an answer and the defendant could not make this defence before,[3] but the points may be made in the course of the trial.[4]

The decision of the state court will not be reviewed if it can be supported on some other ground though a federal question were passed on,[5] nor unless there was an adverse decision on the federal question.[6] The judgment of the state court will be affirmed unless the federal question was decided erroneously.[7] It must appear that a question arising under the Constitution, laws or treaties of the United States was directly involved; it is not sufficient that the decision touched it collaterally.[8] If there are several questions of a federal nature, but only one was considered in the state court, the Supreme Court will not consider the others.[9] The writ of error must be allowed by the chief justice of the state court, or by a justice of the Supreme Court.[10]

Under the Act of 1867,[11] a jurisdiction similar to that of paragraph *b* was vested in the circuit courts. It related in terms only to questions arising in the district courts when sitting as courts of bankruptcy. Paragraph *b*, however, covers similar

[1] Bellingham Bay Co. *v.* New Whatcom, 172 U. S. 314; Capital Bank *v.* Cadiz Bank, 172 U. S. 425.

[2] Pim *v.* St. Louis, 165 U. S. 273; L. & N. R. R. *v.* Louisville, 166 U. S. 709; but see Meyer *v.* Richmond, 172 U. S. 82. The dissenting opinion shows clearly that the state court may have decided the case on a non-federal question.

[3] C., B. & Q. R. R. *v.* Chicago, 166 U. S. 226.

[4] Backus *v.* Fort Street Co., 169 U. S. 557.

[5] Curtis, Jurisdiction U. S. Courts, 2d ed. 51; Foster, Fed. Pract. 2d ed. § 477, p. 1004; Dibble *v.* Bellingham Co., 163 U. S. 63; Bacon *v.* Texas, 163 U. S. 207; Union Bk. *v.* Louisville Ry., 163 U. S. 325; Harrison *v.* Morton, 171 U. S. 38; Pierce *v.* Somerset Ry., 171 U. S. 641; McQuade *v.* Trenton, 172 U. S. 636. See Bausman *v.* Dixon, 173 U. S. 113.

[6] Castillo *v.* McConnico, 168 U. S. 674; Harrison *v.* Morton, *ubi supra;* Pierce *v.* Somerset Ry., *ubi supra.*

[7] Laclede Gas Co. *v.* Murphy, 170 U. S. 78.

[8] Conde *v.* York, 168 U. S. 642; Leyson *v.* Davis, 170 U. S. 36. See Briggs *v.* Walker, 171 U. S. 466.

[9] Dewey *v.* Des Moines, 173 U. S. 193.

[10] Havnor *v.* New York, 170 U. S. 408.

[11] § 2, 14 Stats. 518, R. S. § 4986.

ground, and will give the circuit court of appeals power only over matters of law arising in bankruptcy cases.[1] In §§ 23, 24, and 25, "bankruptcy proceedings" means matters which involve merely questions of the administration of a bankrupt law. They are contrasted with "controversies" arising in bankruptcy. "Controversies" means actions between trustees and persons claiming adversely to them. The latter are cognizable by the circuit courts in certain instances, while the former are intrusted entirely to the district courts.[2] Paragraph *b*, therefore, relates only to the power of the circuit courts of appeal over questions of law arising in bankruptcy proceedings in the district courts.[3]

Under the former law it was held that the circuit court need not exercise this jurisdiction if the necessity of the case did not seem to demand it.[4] This decision is not binding now, because the language of the Act of 1867 was permissive, while that of the Act of 1898 is mandatory.

Paragraph *b* allows the correction of errors of law in a summary way, and no questions of fact can be passed on. Appeals are allowed in certain bankruptcy matters by § 25, and then the whole case is before the court. It may be difficult to determine whether a question is a bankruptcy proceeding which can be reviewed summarily by the circuit court of appeals or not. An adjudication of bankruptcy is undoubtedly such a question;[5] though if the adjudication be after a trial by jury, there can be no review of it in this way, because it would be unconstitutional.[6] Objections to the proof of a debt constitute a bankruptcy question reviewable

[1] Re Rouse, 91 Fed. Rep. 96, 1 N. B. N. 75.

[2] See § 486.

[3] Morgan *v.* Thornhill, 11 Wall. 65; Hall *v.* Allen, 12 Wall. 452; Mead *v.* Thompson, 15 Wall. 635; Insurance Co. *v.* Comstock, 16 Wall. 258; Coit *v.* Robinson, 19 Wall. 274; Bank *v.* Cooper, 20 Wall. 171; Stickney *v.* Wilt, 23 Wall. 150; Sandusky *v.* Nat. Bank, 23 Wall. 289; Conro *v.* Crane, 94 U. S. 441; Hill *v.* Thompson, 94 U. S. 322; Nimick *v.* Coleman, 95 U. S. 266; Cleveland Ins. Co. *v.* Globe Co., 98 U. S. 366; Merchant's Bank *v.* Slagle, 106 U. S. 558; Leggett *v.* Allen, 110 U. S. 741.

[4] Bank *v.* Cooper, 20 Wall. 171.

[5] Morgan *v.* Thornhill, 11 Wall. 65; Insurance Co. *v.* Comstock, 16 Wall. 258; Sandusky *v.* Bank, 23 Wall. 289; Hill *v.* Thompson, 94 U. S. 322; Cleveland Ins. Co. *v.* Globe Co., 98 U. S. 366.

[6] Insurance Co. *v.* Comstock, 16 Wall. 258.

by the higher court.[1] So also the discharge of a bankrupt,[2] a sale of property by the trustee, an exception to the report of trustees appointed to settle up the bankrupt's affairs in a proceeding like a composition scheme,[3] or a decision on the allowance of a claim having priority.[4] But suits by the trustee against a lien claimant,[5] or to recover land,[6] or money collected by an agent of the bankrupt,[7] are controversies between the trustees and adverse claimants which cannot be reviewed by the circuit courts of appeal in the exercise of their supervisory jurisdiction.

§ 488. **Act of 1898.** — SEC. 25. APPEALS AND WRITS OF ERROR. — *a.* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b. From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as

[1] Hall *v.* Allen, 12 Wall. 452; Bank *v.* Cooper, 20 Wall. 171; Leggett *v.* Allen, 110 U. S. 741.

[2] Mead *v.* Thompson, 15 Wall. 635; Coit *v.* Robinson, 19 Wall. 274.

[3] Nimick *v.* Coleman, 95 U. S. 266; Merchant's Bank *v.* Slagle, 106 U. S. 558.

[4] Re Rouse, 91 Fed. Rep. 96, 1 N. B. N. 75.

[5] Marshall *v.* Knox, 16 Wall. 551. Stickney *v.* Wilt, 23 Wall. 150.

[6] Milner *v.* Meek, 95 U. S. 252.

[7] Smith *v.* Mason, 14 Wall. 419.

may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

c. Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d. Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

The phrase "bankruptcy proceedings" is used here as in § 23 in distinction to controversies arising out of the settlement by the trustee of the estate of the bankrupt. This is made evident by the enumeration of the cases in which appeals are granted, all of which are strictly connected with the powers of the bankrupt court.

The district court has authority also to settle controversies arising out of the estates, such as suits between trustees and adverse claimants if the defendant consents to be sued in the district court. (See § 23.)

An appeal was allowed from the district to the circuit court, by § 8 of the Act of 1867,[1] from the allowance or rejection of a

[1] 14 Stats. 520, R. S. § 4980.

claim of five hundred dollars or over.[1] But there was no appeal from an adjudication of bankruptcy[2] nor from a discharge,[3] so that in these two instances a new right of appeal is given by this act.

It appears from a consideration of the terms of paragraph *a* that there is no appeal from an order affirming or revoking a composition, or revoking a discharge. Any error in law in such a proceeding may be reviewed by the circuit court of appeals, in pursuance of its supervisory jurisdiction under paragraph *b* of § 24, but that court cannot pass on errors of fact in these cases.

Under the Act of 1867,[4] the appeal had to be taken in ten days as at present. The appeal must now be allowed by a judge of the court appealed from or a judge of the circuit court of appeals.[5]

Paragraph *b* allows an appeal to the Supreme Court from a final decision of the circuit court of appeals on a claim of two thousand dollars. This is the third one of the matters appealable to the circuit court of appeals from the district court. There can be no appeal from the decision of the circuit court of appeals on the question of adjudication or of discharge.[6] It is difficult to see what is meant by the words "final decision" here. A "final judgment" is held, as we have seen,[7] to mean a judgment which disposes of the whole case and leaves no further judicial proceeding to be taken. That cannot be the meaning here, since a decision on the allowance of a claim is one step only in a bankruptcy proceeding, in which there is no final judgment until the estate is closed.[8] The words probably

[1] Re York, 4 N. B. R. 479, Fed. Cas. No. 18,139; Re Troy Woolen Co., 9 Blatch. 191, Fed. Cas. No. 14,202; Re Place, 9 Blatch. 369, Fed. Cas. No. 11,201.

[2] Morgan *v.* Thornhill, 11 Wall. 65; Sandusky *v.* Nat. Bank, 23 Wall. 289; Cleveland Ins. Co. *v.* Globe Co., 98 U. S. 366.

[3] Mead *v.* Thompson, 15 Wall. 635; Coit *v.* Robinson, 19 Wall. 274.

[4] § 8, 14 Stats. 520, R. S. § 4981.

[5] Rule XXXVI. 1.

[6] The result was the same before the Bankruptcy Act of 1898 was passed, for the discharge, though not a question made final in the circuit court of appeals by the Act of 1891, did not involve any sum of money, and so could not be taken to the Supreme Court. Huntington *v.* Saunders, 163 U. S. 319.

[7] *Supra*, § 487.

[8] Wiswall *v.* Campbell, 93 U. S. 347.

mean a decision of the circuit court of appeals which cannot be reconsidered in that court in any way.

An appeal is allowed in two cases: first, where the sum in controversy is more than two thousand dollars, and the question is one which might have been taken by writ of error from a state court to the Supreme Court; second, where a justice of the Supreme Court certifies that the determination of the question is necessary to a uniform construction of the bankrupt act throughout the United States. It is noteworthy that in the latter case the appeal lies independent of the amount in controversy.

A curious mistake occurs in clause 1 of paragraph *b*, which speaks of an appeal from a state court. We have already seen [1] that there is no appeal from a state court to the Supreme Court, but only a writ of error.[2] The ground for allowing a writ of error in such a case has already been referred to,[3] but it may be stated in a general way to be the adverse decision by the state court of a federal question on which the determination of the case depended.

The sum in controversy here is the same as that required to give the circuit courts jurisdiction,[4] except that it is not mentioned that there must be two thousand dollars in controversy exclusive of interest and costs. Interest would be added to the original debt up to the date of the petition in bankruptcy, and the amount of the claim would be computed in this way. It has been held that if it is legally possible for the plaintiff to recover two thousand dollars, the circuit court will have jurisdiction, though it is extremely unlikely that so large an amount will be recovered.[5] These decisions do not seem controlling in this connection, since the Supreme Court will probably construe this section strictly and refuse to take jurisdiction over a case unless the sum of two thousand dollars is really owing to the creditor. Many of the cases, also, were actions of tort, where

[1] *Supra*, § 487.

[2] R. S. § 709, Egan *v.* Hart, 165 U. S. 188.

[3] *Supra* § 487.

[4] *Supra*, § 486.

[5] Curtis Jurisdiction U. S. Courts, 2d ed, 120 *et seq.*, and cases cited *supra*, § 485.

the damages were indefinite. Such cases will not arise under this section because torts are not provable.[1]

The appeal must be taken within thirty days after the judgment of the circuit court of appeals, and must be allowed by a judge of that court or a justice of the Supreme Court. The circuit court of appeals makes a finding of facts and a finding of law. The record sent up to the Supreme Court consists only of the pleadings, the judgment, and the findings of fact and law.[2]

The questions arising under paragraph *d* as to the certification of questions to the Supreme Court and the issue of writs of certiorari have already been considered.[3]

§ 489. **Act of 1898.** — SEC. 26. ARBITRATION OF CONTROVERSIES. — *a.* The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b. Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c. The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

This provision was contained in the last law,[4] and a somewhat similar one is found in the English act of 1883.[5]

The word "court" here would seem to include the referee.[6] In view especially of Rule XII. it will probably be held that

[1] *Infra*, § 526.
[2] Rule XXXVI.
[3] See § 487.
[4] Act of 1867, § 17, 14 Stats. 524, R. S. § 5061.
[5] Robson, Bankruptcy, 7th ed. 601.
[6] Act of 1898, §§ 1 (7), 38 (4). See Rule XII. 1.

the decision in Re Graves,[1] that application must be made to the judge, is not now the law. This is not one of the proceedings of which the creditors are entitled to notice.[2]

The application for authority to arbitrate must state clearly the subject of the controversy and the reasons why the trustee thinks it wise to submit it to arbitration.[3]

§ 490. **Act of 1898.** — SEC. 27. COMPROMISES. — *a.* The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

There was a similar enactment in the last act of Congress, by virtue of which an assignee under the direction of the court could compromise a doubtful claim, if he thought it for the best interest of the estate.[4] Creditors must have ten days' notice by mail of an intended compromise.[5] The trustee must state in his application the subject-matter involved, and the reason why he thinks it wise to compromise.[6] The referee has authority to empower the trustee to compromise, and the judge need not pass on the question.[7]

§ 491. **Act of 1898.** — SEC. 28. DESIGNATION OF NEWSPAPERS. — *a.* Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties

[1] 1 N. B. R. 237, Fed. Cas. No. 5709.
[2] Act of 1898, § 58.
[3] Rule XXXIII.
[4] Act of 1867, § 17, 14 Stats. 524, R. S. § 5061.
[5] Act of 1898, § 58 *a* (7).
[6] Rule XXXIII.
[7] *Supra*, § 489.

in interest, designate some additional newspaper in which notices and orders in such case shall be published.

This section contemplates that the district court shall by standing order designate some one newspaper in each county in which notices are to be published. The latter part of the section gives the court or referee power in a particular case to have notices published in another newspaper also.

§ 492. **Act of 1898.** — SEC. 29. OFFENSES. — *a.* A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

b. A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c. A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offence of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

d. A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

No such offence was prescribed by the last law as that contained in paragraph *a*.

The offence of concealing property may be committed at any time after proceedings in bankruptcy are begun (§ 1 (4)). Concealing property includes secreting, falsifying or mutilating it (§ 1 (22)), and would include hiding property by false transfers.[1] It would seem also that a wilful destruction of property might be within the scope of the word "mutilate." But the act of concealing books of account is made a disqualification for a discharge, and the definition of concealing was apparently adopted with this matter in view.

Under the last law a concealment of property was an offence punishable by imprisonment[2] and also a ground for refusing a discharge.[3] It would probably have been a ground for refusing a discharge under that law if the bankrupt had wilfully omitted

[1] *Supra*, §§ 35, 477.

[2] Act of 1867, § 44, 14 Stats. 539, R. S. § 5132.

[3] Act of 1867, § 29, 14 Stats. 531, R. S. § 5110.

part of his property from his schedule,[1] though there would always have been other means taken by him to conceal his property, and a bankrupt under such circumstances would have been subject to the disqualification incurred by taking a false oath to his schedule,[2] which is an offence under clause 2 of this section.[3]

It must be shown that the bankrupt's oath was wilfully and knowingly false.[4] The burden of proving this is on the objecting creditor.[5]

Presenting a false claim under oath was not an offence under the last law, but was a disqualification to the bankrupt from getting his discharge. In order to convict a person of this offence it must be shown that the false oath was wilfully and fraudulently made. Therefore an omission from a bankrupt's schedule if made in good faith does not make the oath to the schedule a false one.[6]

Clause 3 does not apply to an attorney presenting a false claim against the estate of a bankrupt except in composition proceedings. It is to be noticed that in such proceedings the act of using a false claim may give rise to two penalties. Thus where a person uses the claim through an agent or attorney the principal is liable to punishment and also the agent if the latter knew that the claim was false.

The disposition of property with intent to defeat or delay the operation of the act was an act of bankruptcy under the last law.[7] It was under the scope of this fraud that general assignments were held bad.[8]

The offence described in clause *b* (4) would be committed though the operation of the act were not defeated. The essential elements of the crime are receiving the property with

[1] Re Hussman, 2 N. B. R. 437, Fed. Cas. No. 6951; Re Eidom, 3 N. B. R. 106, Fed. Cas. No. 4314; Re Connell, 3 N. B. R. 443, Fed. Cas. No. 3110; Re Smith, 13 N. B. R. 256, Fed. Cas. No. 12,995.

[2] Act of 1867, § 29, 14 Stats. 531, R. S. § 5110.

[3] Re Hill, 1 N. B. R. 431, Fed. Cas. No. 6483; Re Rathbone, 1 N. B. R. 536, Fed. Cas. No. 11,583. See *supra*, § 476.

[4] Re Polakoff, 1 N. B. N. 232.

[5] Ib.

[6] Re Needham, 2 N. B. R. 387, Fed. Cas. No. 10,081.

[7] Act of 1867, § 39, 14 Stats. 536, R. S. § 5021.

[8] *Supra*, § 37.

the wrongful intent.[1] But as this is made a crime and one of the elements of it is the intent, this must be proved and will not be presumed. It would seem therefore that the cases relating to preferences and other acts of bankruptcy,[2] which hold that in certain circumstances intent may be presumed, are not to be followed in this connection.

The property of the bankrupt received with intent to defeat the act must be property which would be subject to be taken by trustees. Therefore although a person to whom a bankrupt had transferred property exempt from the act would be within the letter of this law strictly construed, it would probably be held that the case did not fall within its provisions, because the transfer did not defeat the act. Penalties are intended only for the punishment of acts which interfere with the due administration of the bankrupt law.

Under its true construction this section would cover a case where the act was interfered with, as well as one where its operation was totally stopped. The word "defeat" means only any hindrance or prevention of the disposition of the assets of the bankrupt as contemplated under the bankrupt law.

The provision of clause *b* (5) is aimed primarily at creditors who attempt to get an advantage to themselves as an equivalent for agreeing to a composition.[3] The wrong would be committed, however, as well by a person who should extort money from a person in failing circumstances as a consideration for not bringing a petition against him or for not opposing a discharge or proving a claim or any other act in connection with bankruptcy. The section is broad enough to cover the wrongful act of a bankrupt who extorts money as a consideration for neglecting any of his duties under the act whereby certain creditors profit.

The word "person" is defined to include officers (§ 1 (19)). It seems therefore that the offences prohibited by clause (5) would apply to officers also. Officers are clerks, marshals, receivers, referees, and trustees, (§ 1 (18)).

[1] See *supra*, § 33.
[2] *Supra*, §§ 32, 73.
[3] *Supra*, § 475.

§ 493. **Act of 1898.** — SEC. 30. RULES, FORMS, AND ORDERS. — *a.* All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

The Supreme Court was given the same power under the former act, and the procedure under it was prescribed largely by the forms adopted.[1]

The rules and forms under the present act went into force on the first Monday of January, 1899.

§ 494. **Act of 1898.** — SEC. 31. COMPUTATION OF TIME. — *a.* Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

The same rule prevailed under the last law.[2]

§ 495. **Act of 1898.** — SEC. 32. TRANSFER OF CASES. — *a.* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

[1] Act of 1867, § 10, 14 Stats. 521, R. S. § 4990.

[2] *Supra*, § 46.

Under former Rule XVI. of the Supreme Court, the court where a petition against a firm was first filed kept the control of the case. If petitions were filed against an individual in different districts, the court of the district where he had his domicile kept control.

The same provision is contained in Rule VI. of the General Orders established under the Act of 1898. In the case of a partnership, the court retaining jurisdiction may transfer the case to the court where it can be most conveniently disposed of.[1] There is no such provision where petitions are filed in different districts against an individual. The rule seems in conflict with the provision of § 32.[2]

Rule VI. provides also for amending the earlier petition by alleging a different act of bankruptcy which was contained in the later petition.

[1] *Supra*, § 468.

[2] See *supra*, § 468.

CHAPTER V.

OFFICERS, THEIR DUTIES AND COMPENSATION.

§ 496. **Act of 1898.** — SEC. 33. CREATION OF TWO OFFICES. — *a.* The offices of referee and trustee are hereby created.

These officers were formerly called in America registers and assignees.

§ 497. **Act of 1898.** — SEC. 34. APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES. — *a.* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

It seems to be the intention that the districts of referees shall be contained within the limits of a county, and the court is given power to divide a county into as many districts as is necessary (§ 37). There is no power to appoint more than one referee to any one district.

§ 498. **Act of 1898.** — SEC. 35. QUALIFICATIONS OF REFEREES. — *a.* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2)

not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

Consanguinity is relationship by blood and affinity by marriage, and the degrees are determined in the same way.[1] Relatives in the third degree as reckoned by the common law are great grandson, great grandfather, great uncle, son of a great uncle, second cousin, son of a first cousin, and grandson of a brother.[2]

§ 499. **Act of 1898.** — SEC. 36. OATHS OF OFFICE OF REFEREES. — *a.* Referees shall take the same oath of office as that prescribed for judges of United States courts.

Form 16 prescribes the oath of office which must be taken by referees. The judge administers the oath and subscribes to it as administering officer.

§ 500. **Act of 1898.** — SEC. 37. NUMBER OF REFEREES. — *a.* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

[1] Bouvier's Dictionary, Tit. Affinity. [2] Bouvier's Dictionary, Tit. Consanguinity; 2 Bla. Comm. 202.

§ 501. **Act of 1898.** — SEC. 38. JURISDICTION OF REFEREES. — *a.* Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

Proceedings before the register were subject to revision by the judge under the last law.[1] Referees are to make a record of the evidence in contested matters as agreed to by the parties

[1] Act of 1867 §§ 4, 6, 14 Stats. 519, England. Re Cronmire (1894), 2 Q. B. 520, R. S. § 5009, 5010. And so in 246.

and transmit it to the judge (§ 39 (5.)) The person applying for a review shall petition the referee setting out the error. The referee shall then certify to the judge a summary of the evidence relating to the question and his finding thereon.[1]

The petitions referred to referees are voluntary and unopposed involuntary petitions when the judge is out of the district at the time of filing (§ 18 *f*, *g*).

The judge is given power in certain instances to take possession of the property of the bankrupt.[2] If the judge is absent or sick or unable to act, the referee under clause 3 may exercise these powers on receiving a certificate from the clerk of the judge's absence, sickness or inability to act. This clause does not give the referee power in the absence of the judge to appoint receivers, as it applies only to cases where a petitioning creditor desires to take possession of the estate and files a bond.[3] Receivers are to be appointed only in cases of urgent necessity, and it appears clearly from the terms of § 2 (3) that the judge is to pass on the question. Rule XII. provides that after a case is referred to the referee he shall take all proceedings except those which a judge must pass on, but the receiver will be appointed usually before the adjudication and therefore before the reference of the case. It has been held by Mr. Referee Moss of the northern district of New York that a referee may appoint a receiver,[4] but the decision seems doubtful. The opinion of Judge Brown in Re Gutwillig[5] seems inconsistent with it. It is the practice in New York for a referee to grant an injunction.[6] This is directly contrary to the prohibition of Rule XII. and is wrong. But the referee is nowhere forbidden to grant a restraining order and the desired result may be reached in this way.

Rule XII. gives the referee jurisdiction over everything except matters relating to compositions and discharges,[7] petitions

[1] Rule XXVII., see Form 56.

[2] See *supra*, § 466.

[3] See §§ 466, 532. In Re Rogers, 1 N. B. N. 211, it was held that when the judge was unable to act the referee might issue an injunction. This decision is contrary to Rule XII.

[4] Re Abrahamson, 1 N. B. N. 23.

[5] 90 Fed. Rep. 475, 1 N. B. N. 18.

[6] Re Adams, 1 N. B. N. 167.

[7] Clause (4) of the present section.

for adjudication when the judge is present,[1] the removal of trustees[2] the appointment of receivers,[3] the taking possession of property if the judge is not absent,[4] proceedings for punishment for contempt,[5] and applications for an injunction.[6] The judge must approve the referee's bond[7] and the bonds required in case of an application for taking possession of property.[8]

The judge may refer an application for a discharge or composition or an injunction to the referee to report on the facts.[9]

§ 502. **Act of 1898.** — SEC. 39. DUTIES OF REFEREES.—*a.* Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are

[1] Act of 1898, § 18.
[2] Rule XIII.
[3] See *supra*.
[4] Clause (3) of this section.
[5] Act of 1898, § 41 b.
[6] Rule XII. 3.
[7] Form 17.
[8] Forms 9, 10.
[9] Rule XII. 3.

concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b. Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practise as attorneys and counsellors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

The first dividend must be declared within thirty days of the adjudication, if there is money enough to pay all debts which have priority and five per cent on all claims which will probably be allowed.[1] The second dividend is to be paid when there is money enough to pay 10 per cent on all allowable claims.[2] The referee must prepare a dividend sheet and transmit it to the trustee.[3]

By a comparison of § 7 (8) with clauses 2 and 6 of paragraph *a* it seems that the referee is to have supervision of the preparation of schedules and cause them to be filed in case the bankrupt neglects to do it. In case an involuntary bankrupt is absent or refuses to file his schedule, the petitioning

[1] Act of 1898, § 65 b.
[2] Ib.
[3] Form 40.

creditors are to file it, or they may have an attachment against a debtor who neglects to file his schedule after notice.[1]

Besides the duties enumerated here the referee is to preside at the first meeting of creditors.[2]

The phrase "parties in interest" means all persons whose rights are affected in any way by the bankruptcy proceedings.[3]

The referee is required to give ten days' notice by mail to all creditors of examinations of the bankrupt, applications for a composition, meetings of creditors, sales of property, dividends, filing of trustees' final accounts, compromises and the proposed dismissal of the proceedings.[4] He must also publish notice of the first meeting.[5] The clerk is to give notice of applications for discharge.[6] The notices are to be sent to the addresses contained in the depositions accompanying the proof of debts unless the creditors shall request the referee to send notices to some other address.[7] If any creditor has not proved his debt, notice shall be sent to the address appearing in the list of the bankrupt's creditors.[8]

The person desiring a review by the judge of any question decided by the referee shall file a petition setting forth the error complained of. The referee shall then certify to the judge a summary of the evidence, the question, and his finding thereon.[9]

Besides the duty imposed by clause 7 of transmitting the records to the clerk, the referee must file with him a list of the claims proved against the estate.[10]

It is provided by Rule XXII. that the referee may take down the testimony of witnesses in the form of a narrative unless he determines that it shall be by question and answer.[11] As to the manner of taking testimony see *supra*, § 483.

The referee must notify a trustee of his appointment. The notice should contain the amount fixed as the penal sum of the

[1] Rule IX.
[2] Act of 1898, § 55 b, *infra*, § 518.
[3] See *supra*, §§ 475, 477.
[4] Act of 1898, § 58.
[5] Ib.
[6] Form 57.
[7] Rule XXI. 2.
[8] Act of 1898, § 58.
[9] Rule XXVII.
[10] Rule XXIV.
[11] Rule XXII.

trustee's bond, and require the trustee to notify the referee forthwith of his acceptance or rejection of the trust.[1]

All orders made by a referee must state whether they are made by consent or after notice and a hearing. The manner of giving notice must be stated, and that no adverse interest was present at the hearing if that be the fact.[2]

The referee shall keep an accurate account of his travelling and incidental expenses and of those of his clerk or officer attending him in the performance of his duties. He shall make a return under oath to the judge, with vouchers whenever possible, on the first Tuesday in each month.[3]

A referee may be punished by fine and forfeiture of his office if he acts in a case where he is interested, or purchases any part of the estate of which he is referee, or if he refuses to allow an inspection of his accounts if the court orders it.[4] There is no punishment prescribed for a referee who acts as an attorney in bankruptcy proceedings. It has been held that a referee is not disqualified from acting under the terms of paragraph *b*, clause 1, because he owes the bankrupt a debt.[5]

§ 503. **Act of 1898.** — Sec. 40. Compensation of Referees — *a*. Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

b. Whenever a case is transferred from one referee to another the judge shall determine the proportion in

[1] Rule XVI.
[2] Rule XXIII.
[3] Rule XXVI.
[4] Act of 1898, § 29 c.
[5] Bray *v.* Cobb, 91 Fed. Rep. 102.

which the fee and commissions therefor shall be divided between the referees.

c. In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

In addition to the compensation provided by this section referees may be allowed their travelling and incidental expenses incurred while performing their duties under the act, if approved by special order of the judge.[1] Referees are required to file under oath a monthly account of such expenses.[2] Referees as well as clerks and marshals may demand indemnity before incurring expense.[3]

Only one fee can be demanded on a partnership petition, since it is only one entire proceeding.[4]

§ 504. **Act of 1898.** — SEC. 41. CONTEMPTS BEFORE REFEREES. — *a.* A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpœnaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

[1] Rule XXXV. 2.
[2] Rule XXVI.
[3] Rule X.
[4] Re Langslow, 1 N. B. N. 232.

b. The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

A debtor will be committed if he disobeys an order of court for examination,[1] but he cannot be punished for neglecting to attend unless his fees be tendered him.[2]

All commitments for contempt are determined in a summary manner, as it would interfere with the execution of the orders of the court if an extended trial were necessary in every case. There is no right to a jury trial in a case of this kind.[3]

The bankrupt cannot refuse to deliver his books of account to the trustee when ordered to do so by the referee. The fact that they may furnish evidence which will incriminate him is not a sufficient reason for a refusal.[4] While a bankrupt may refuse to answer criminating questions, he can not refuse to take the oath.[5]

§ 505. **Act of 1898.** — SEC. 42. RECORDS OF REFEREES. — *a.* The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b. A record of the proceedings in each case shall be

[1] Ex parte Clifton, 7 Morrell, 59.
[2] Re Batson, 1 Manson, 45.
[3] Cooley, Constitutional Limitations, 6th ed. p. 389, note 2.
[4] Re Sapiro, 92 Fed. Rep. 340, 1 N. B. N. 136.
[5] Re Scott, 1 N. B. N. 161.

kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c. The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

After a case is concluded, the referee should transmit to the clerk the record and all papers in the case.[1]

§ 506. **Act of 1898.** — SEC. 43. REFEREE'S ABSENCE OR DISABILITY. — *a.* Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

§ 507. **Act of 1898.** — SEC. 44. APPOINTMENT OF TRUSTEES. — *a.* The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

Trustees are to be chosen by a vote of a majority of all creditors present whose claims have been allowed (§ 56). Their appointment is subject to the approval of the referee or judge.[2]

[1] Act of 1898, § 39 a (7). [2] Rule XIII.

This was the law under the act of 1867.[1] The referee will almost always be the one to approve, but his action may be reviewed by the judge under § 38. The creditors sign the appointment certificate, and the referee writes his approval on it.[2]

The trustee is to be notified of his appointment by the referee, who must tell him the penal sum of his bond and require him to accept or reject the appointment at once.[3]

There is no power to appoint an additional assignee as was done under the Act of 1867[4] in certain cases.

If the creditors do not appoint a trustee, the referee does so. The order of appointment should state the fact that the creditors did not make choice of a trustee.[5] If the trustee is removed or resigns, the referee must call a meeting for the choice of a new trustee.[6] The same procedure would probably be followed, if a trustee refused to accept the office.

§ 508. **Act of 1898.** — SEC. 45. QUALIFICATIONS OF TRUSTEES. — *a.* Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

A trustee must have no interests adverse to those of the general creditors,[7] and must not have used unfair means to procure his appointment. Confirmation was refused when the bankrupt had canvassed for votes for a certain person as assignee or when the assignee himself had done so in certain circumstances.[8]

[1] *Supra*, § 289.
[2] Form 22.
[3] Rule XVI. See Form 24.
[4] *Supra*, § 293.
[5] Form 23.
[6] Form 55.
[7] *Supra*, § 290.
[8] Ib.

It was held under the last law that the trustee should have a residence within the jurisdiction.[1] He must now reside or have an office within the judicial district. This will not prevent the creditors from appointing a person residing in another district to be trustee within that district, as was sometimes done.[2]

The provisions of clause 2 are new. "Judicial district" is used here in contrast with territorial district in § 35 (4). It means the district over which the court of bankruptcy has jurisdiction, and includes all the referees' districts which are established by the court under the authority of § 34.

§ 509. **Act of 1898.** — SEC. 46. DEATH OR REMOVAL OF TRUSTEES. — *a.* The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

The court of bankruptcy may remove a trustee on the complaint of a creditor after a hearing (§ 2 (17)); the referee has not this power.[3] There is no power under this law for creditors to remove trustees, as there used to be by § 5039 of the Revised Statutes.[4] A trustee may be removed for gross neglect of his duties as well as for fraud,[5] and for refusal to permit an examination of the affairs of the estate.[6]

The same provision as to survival of suits begun by a trustee was contained in Revised Statutes, § 5048.[7] Under the Act

[1] *Supra*, § 291.
[2] Ib.
[3] Rule XIII.
[4] Formerly § 18 of Act of 1867, 14 Stats. 525.
[5] Re Morse, 7 N. B. R. 56, Fed. Cas. No. 9852; Re Blodget, 5 N. B. R. 472, Fed. Cas. No. 1552. See Rule XVII.
[6] Re Perkins, 8 N. B. R. 56, Fed. Cas. No. 10,982.
[7] Formerly § 16 of Act of 1867, 14 Stats. 524.

of 1800 the executor of an assignee succeeded to his rights of action.[1]

The judge alone has the power to remove a trustee.[2] A creditor desiring his removal must petition the judge, stating the reasons why the trustee should be removed, and asking for a hearing.[3] Notice of the petition, with the name of the petitioner and the reasons alleged, must be given to the trustee.[4] If, after a hearing, the judge determines on the removal, he must make an order to that effect.[5] A meeting for the appointment of a new trustee is then called by the referee.[6]

If the trustee neglects to file any report or statement which it is his duty to file within five days of the time when it is due, the referee must order him to show cause before the judge why he should not be removed from his office.[7] A copy of the order shall be served on the trustee seven days before the time set for the hearing, and proof of the service thereof shall be given to the clerk of the court.[8] The order for removal prescribed by Form 54 is only suitable to the case of a removal on a creditor's petition. It should be changed to suit the facts of a removal under Rule XVII.

§ 510. **Act of 1898.**— SEC. 47. DUTIES OF TRUSTEES.— *a.* Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in

[1] Richards *v.* Maryland Ins. Co., 8 Cranch, 84.
[2] Rule XIII.
[3] Form 52.
[4] Form 53.
[5] Form 54.
[6] Form 55.
[7] Rule XVII.
[8] Ib.

which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b. Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

The trustee is chosen at the first meeting of creditors,[1] and the amount of his bond is then determined.[2] If the creditors do not choose a trustee, the referee will do so.[3] The referee notifies him of his appointment and of the bond required, and it is the trustee's duty at once to accept or reject.[4] He must file his bond within ten days of his appointment, or within five days longer if the court grants an extension of time.[5] The

[1] See § 507.
[2] See § 513.
[3] See § 507. Form 23.
[4] Form 24.
[5] Act of 1898, § 50 b.

bond is subject to the approval of the referee, who is to be satisfied by evidence of the value of the property of the sureties,[2] of whom there must be two.[3] Their property must be worth at least the amount of the bond over and above their liabilities and exemptions.[4] Corporations may be accepted as sureties on trustees' bonds.[5] The bond is to be filed in the office of the clerk of court.[6] If a trustee fails to give a bond within the prescribed time, he will be deemed to have refused the appointment, or if he has accepted it his failure to give bond will vacate his office.[7] Joint trustees may give joint or several bonds.[8] A trustee's bond does not require a stamp.[9] A certified copy of the order approving the bond [10] shall be conclusive evidence of the trustee's title.[11]

As soon as the trustee has accepted his appointment and given bond, he must prepare an inventory of all the bankrupt's property.[12] If the bankrupt has no property, the trustee makes return that there are no assets.[13] Then, within twenty days after receiving notice of his appointment, he must set off the bankrupt's exemptions and report them to the court, with their estimated value.[14] The form of report is prescribed.[15] Any creditor may except, and his exceptions shall be argued before the referee, subject to a review by the judge, on the request of either party.[16]

The trustee must within the first month make a report to the court of the condition of the estate.[17] He must pay dividends within ten days after the referee declares them;[18] and as a dividend must be declared within thirty days of the adjudication in many cases (§ 65 b), the trustee will have to pay the dividend soon after his appointment, which will not often take

[1] Form 26.
[2] Act of 1898, § 50 d.
[3] Ib. § 50 e.
[4] Ib. § 50 f.
[5] Ib. § 50 g.
[6] Ib. § 50 h.
[7] Ib. § 50 k.
[8] Ib. § 50 j.
[9] See 1 N. B. N. 205.
[10] Form 26.
[11] Act of 1898, § 21 e.
[12] Rule XVII.
[13] Form 48.
[14] Rule XVII. See Re Camp, 91 Fed. Rep. 745.
[15] Form 47.
[16] Rule XVII.
[17] Act of 1898, § 47 (10).
[18] Act of 1898, § 47 (9).

place much less than thirty days after adjudication. The notice of dividend is to be given as laid down by Form 41.

Rule XXIX. provides that no money shall be drawn from a depository except by a check or warrant signed by the clerk or trustee, and countersigned by the judge or clerk or referee. There must be stated in the warrant or check the date, sum, and account for which the money is drawn. All checks must be entered in the books when they are drawn.[1]

The trustee is to keep regular accounts showing receipts and disbursements,[2] and report every two months to the court, showing the condition of the estate and the cash on hand.[3] He must settle the estate as speedily as possible,[4] and deposit all money in a bank designated by the court as the proper depository for bankrupt estates.[5] All interest received from the property of a bankrupt estate must be paid to the estate.[6] Payment of dividends and other disbursements are to be made only by checks,[7] which must have revenue stamps.[8]

The final report and account of the trustee is to be filed with the court at least fifteen days before the date of the last meeting of the creditors.[9] At the last meeting the trustee must make a detailed statement of the administration of the estate[10] He must be ready at all times to furnish information concerning the estate to all interested parties,[11] and his papers and accounts are at all times open to the inspection of such parties.[12]

If the trustee neglects for five days to file any report or statement which it is his duty to file, the referee must order the trustee to show cause before the judge why he should not be removed.[13]

The trustee's accounts are to be audited by the referee unless the court otherwise specially orders.[14] The form of account is given in Form 49. The final account must be sworn to.[15]

[1] Rule XXIX.
[2] Act of 1898, § 47 (6).
[3] Ib. § 47 (10). See Form 49.
[4] Ib. § 47 (2).
[5] Ib. § 47 (3). See § 524.
[6] Ib. § 47 (1).
[7] Ib. § 47 (4).
[8] See 1 N. B. N. 205.
[9] Act of 1898, § 47 (8).
[10] Ib. § 47 (7).
[11] Ib. § 47 (5).
[12] Ib. § 49.
[13] Rule XVII.
[14] Ib.
[15] Form 50.

When the final account has been allowed the trustee will be discharged.[1] It must be presented to a meeting of the creditors, who will have power to accept or refuse it.[2]

A trustee may submit a controversy to arbitration, and if he desires to do so he must file a petition setting forth the facts and the reasons why he wishes to arbitrate.[3] In a similar way he may compromise a controversy.[4] The creditors are entitled to ten days' notice of a compromise, but not of a submission to arbitration.[5] Claims or debts may be compounded after petition and notice if the referee so orders.[6]

The trustee may apply to the referee by petition to re-examine any claim.[7] He may ask for a review by the judge of any order of the referee.[8] He may ask for an examination of the bankrupt,[9] and he should take part in any examination so as to inform himself of the condition of the estate and to protect the interests of creditors.

For appointment of trustees, see § 506; removal of trustees, § 508; compensation of trustees, § 510; property vesting in trustees, § 532; suits by or against trustees, § 473. As to the jurisdiction of state courts over suits by trustees, see § 485. For sales by a trustee, see § 532; redemption of property from a lien or sale subject to a lien, see § 532.

§ 511. **Act of 1898.** — SEC. 48. COMPENSATION OF TRUSTEES.—*a.* Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed

[1] Form 51.
[2] See *infra*, § 518.
[3] See *supra*, § 489.
[4] See *supra*, § 490.
[5] Act of 1898, § 58.
[6] Rule XXVIII.
[7] Rule XXI. (6).
[8] Rule XXVII. See § 500.
[9] Act of 1898, § 21 a.

three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars.

b. In the event of an estate being administered by three trustees instead of one trustee, or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

c. The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

In addition to their fees allowed by this section, trustees are entitled to the necessary expenses which are approved in the settlement of their accounts.[1]

There is no provision here, as there is in the section relating to payment of referees,[2] for any compensation to trustees in composition cases. Sometimes a composition may be offered and confirmed after the trustee has performed services to the estate. It is doubtful whether there is any authority under the act to give the trustee compensation in such a case. Perhaps the court might find a way to pay the trustee a commission as part of the cost of administration of the estate under § 64 *b* (3). The cost of administration is a debt having priority, and as such must be paid in a composition.[3]

A reasonable attorney's fee was allowed to the assignee under the last act, if the work had been performed in the course of administration of the estate.[4] But an assignee who was an

[1] Rule XXXV. 3.
[2] Act of 1898, § 40.
[3] Ib. § 12 b.
[4] Re Pegues, 3 N. B. R. 80, Fed. Cas. No. 10,907; Re Tulley, 3 N. B. R. 82, Fed. Cas. No. 14,235; Maybin *v.* Raymond, 15 N. B. R. 353, Fed. Cas. No. 9338; Re Brinker, 19 N. B. R. 195, Fed. Cas. No. 1882; Re Sawyer, 2 Lowell, 551, Fed. Cas. No. 12,396; Re Muldaur, 8 Ben. 65, Fed. Cas. No. 9905; Re Cook, 17 Fed. Rep. 328 (and

attorney could not recover compensation for his own legal services.[1] It would seem that such fees should be allowed to trustees under the act of 1898 by virtue of the provisions of Rule XXXV. (3), which gives them the "expenses necessarily incurred in the performance of their duties." [2]

§ 512. **Act of 1898.** — SEC. 49. ACCOUNTS AND PAPERS OF TRUSTEES. — *a.* The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

It is made an offence punishable by fine and forfeiture of his office for a trustee to refuse to show his accounts to parties in interest when the court orders it.[3]

The final accounts of a trustee are to be laid before a meeting of creditors.[4] Apparently they must be accepted or allowed by the creditors, though there is no express provision to that effect in the act. The referee is to approve them, and on their approval the trustee is discharged.[5]

§ 513. **Act of 1898.** — SEC. 50. BONDS OF REFEREES AND TRUSTEES. — *a.* Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

cases cited); Re Treadwell, 23 Fed. Rep. 442; Gazin *v.* Norton, 38 Fed. Rep. 200. See Meddaugh *v.* Wilson, 151 U. S. 333.

[1] Re Muldaur, 8 Ben. 65, Fed. Cas. No. 9905; but see Re Welge, 1 Fed. Rep. 216.

[2] Re Mitchell, 1 N. B. N. 264; Re Michel, 1 N. B. N. 265.

[3] Act of 1898, § 29 c (3).

[4] Ib. § 55 f.

[5] Form 51.

b. Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c. The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

d. The court shall require evidence as to the actual value of the property of sureties.

e. There shall be at least two sureties upon each bond.

f. The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

g. Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h. Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk

of the court and may be sued upon in the name of the United States, for the use of any person injured by a breach of their conditions.

i. Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

j. Joint trustees may give joint or several bonds.

k. If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

l. Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m. Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Under section 5036 of the Revised Statutes [1] an assignee was required by the court to give a bond if any creditor requested it.

A copy of the order approving the bond of a trustee is conclusive evidence of the vesting of the bankrupt's property in him.[2]

The Supreme Court has given forms for bonds of referees [3] and trustees.[4]

§ 514. **Act of 1898.**—SEC. 51. DUTIES OF CLERKS.—*a.* Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons

[1] Formerly § 13 of the Act of 1867, 14 Stats. 522.

[2] Act of 1898, § 21 e. See Form 26.

[3] Form 17.

[4] Form 25.

other than officers; (2) collect the fees of the clerk, referee and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

The clerk keeps a docket in which he enters a memorandum of all the proceedings except such as appear in the referee's record.[1] He must indorse on every paper filed with him the day and hour of its filing and a brief statement of its character.[2]

It is the clerk's duty to refer to the referee voluntary petitions and unopposed involuntary petitions if the judge is absent from the district.[3] He must also issue a certificate of the judge's absence, illness, or inability to act, if a creditor applies to take possession of the property of the debtor, as in such a case the referee has authority to act.[4]

Clause 2 provides that a voluntary bankrupt need not pay the usual fees if he makes affidavit that he cannot get the money to do it. In a suspicious case the referee will take evidence as to the truth of the bankrupt's inability to get the money.[5] If he subsequently becomes able to pay the fees he must do so, and if he fails to pay them after an order of the

[1] Rule I.
[2] Rule II.
[3] Act of 1898, § 18 f, g.
[4] Act of 1898, § 38 (3).
[5] Re Collier, 93 Fed. Rep. 191, 1 N. B. N. 257.

court, his petition may be dismissed.[1] The debtor is bound to pay the fee out of exempt property, and if he will not do this he cannot apply *in forma pauperis*.[2]

The clerk, marshal, or referee may require indemnity for expenses incurred.[3] It has been ruled in some districts that a debtor who has filed a petition and taken the oath that he cannot pay the fees will not be granted his discharge unless he pays the costs of the court officers.[4]

§ 515. **Act of 1898.** — SEC. 52. COMPENSATION OF CLERKS AND MARSHALS. — *a*. Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

b. Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

The fee of the clerk is in full compensation for his services in delivering copies to officers, or in filing papers or receiving or paying out money. It does not cover services in furnishing copies to other persons, or expenses in publishing or mailing notices.[5]

Marshals are obliged to file accounts under oath of their expenses, with vouchers whenever that is possible. A statement should be made also that the charges are just and reasonable.[6]

[1] Rule XXXV. (4).
[2] Re Collier, 93 Fed. Rep. 191, 1 N. B. N. 257; see 1 N. B. N. 251, 279.
[3] Rule X.
[4] See 1 N. B. N. 48, 132.
[5] Rule XXXV. (1).
[6] Rule XIX. See Form No. 8.

Clerks, marshals, and other officers may demand indemnity before incurring necessary expenses.[1]

§ 516. **Act of 1898.**—SEC. 53. DUTIES OF ATTORNEY-GENERAL. — *a.* The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

§ 517. **Act of 1898.**—SEC. 54. STATISTICS OF BANKRUPTCY PROCEEDINGS. — *a.* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

[1] Rule X.

CHAPTER VI.

CREDITORS.

§ 518. **Act of 1898.** — SEC. 55. MEETINGS OF CREDITORS. — *a.* The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

b. At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

c. The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act.

d. A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

e. The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

f. Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

The trustee is to be chosen at the first meeting and the amount of his bond decided (§ 44 and § 50 *c*).

Under the rules of the Supreme Court the referee is to perform everything under the act after the case has been referred to him, except what must be done by the judge.[1] Therefore it will be the referee who will preside at meetings. The form of notice of the first meeting is laid down by the Supreme Court.[2]

Under Rule VI. established by the Supreme Court by the authority of the Act of 1867, power was given the register to arrange for adjournments of meetings. This will undoubtedly be the law under the present act, though there is no similar provision in the Rules.

Paragraph *e* requires that one-fourth in number of all creditors who have proven their claims must assent in writing to the calling of a meeting. This would include creditors who had filed their claims whether they had been passed on by the

[1] Rule XII. 1. [2] Form 18.

court or not, and even if the court had rejected them. Would the creditors who had made the necessary statement under oath but had not filed their claims be included? Such creditors have proven their claims (§ 57 a), but inasmuch as the oath need not be taken before an officer of the court (§ 20), there would be no way of discovering how many creditors had done so. The most reasonable construction of this section would exclude the creditors who had not filed their claims.

The referee has power under the rules to call a meeting whenever it is necessary,[1] and must do so if the trustee is removed and a new one is to be chosen.[2] If a debtor desires to offer a composition to his creditors, he may have a meeting called on filing a petition asking for it.[3]

Under the provisions of paragraph *f* the creditors will undoubtedly have the power to pass on the final accounts of trustees. The terms of Form 51 do not seem to intend that the creditors should have the power, but the Form itself is not inconsistent with such a construction of the present paragraph, and it is a more natural interpretation of it. There would be no reason for calling a final meeting of creditors if they could do nothing when they met. The true intention of the act is that the creditors should have power over the settlement of the estate and the final account. Then the Form provides that the allowance of the account by the referee shall discharge the trustee.[4] The final report and account must be filed by the trustee fifteen days before the last meeting,[5] and the trustee must lay before the meeting detailed statements of the administration of the estate.[6] These provisions show that the creditors have control of the closing of the estate.

Besides the powers of creditors at meetings, each creditor has certain rights under the act after the proceedings have been begun. Thus any creditor may join in a petition after it is filed or object to an adjudication.[7] He may ask for the removal of a trustee.[8] He may petition for the sale of perishable

[1] Rule XXV.
[2] Form 55.
[3] Form 60.
[4] Form 51.
[5] Act of 1898, § 47 (8).
[6] Ib. § 47 (7).
[7] Ib. § 59 f.
[8] Ib. § 2 (17), Form 52. See § 509.

property.[1] He may object to the sale of property[2] or the redemption of property from a lien;[3] or if he has proved his debt he may ask for redemption of property from liens or for the compounding of a claim.[4] Any creditor may oppose the dismissal of the proceedings[5] or the compromise of any controversy.[6] He may examine the accounts of trustees[7] and ask for an examination of the bankrupt.[8] He may petition the court for an examination of the payment by a debtor of attorneys' fees.[9] He may except to the report of the trustee on the bankrupt's exemptions[10] or ask for the re-examination of a claim.[11] The proof of other creditors may be objected to,[12] and a review of any ruling of the referee may be requested.[13] A creditor may also oppose the confirmation of a composition or the granting of a discharge,[14] and may apply for the revoking of a discharge or the setting aside of a composition.[15]

§ 519. **Act of 1898.** — SEC. 56. VOTERS AT MEETINGS OF CREDITORS. — *a.* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

b. Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

[1] Rule XVIII. 3.
[2] Forms 42, 44, 45, 46.
[3] Form 43.
[4] Rule XXVIII.
[5] Act of 1898, § 59 g.
[6] Ib. § 58 a (7).
[7] Ib. § 49.
[8] Ib. § 21 a.
[9] Ib. § 60 d.
[10] Rule XVII See § 510.
[11] Rule XXI. 6.
[12] See §§ 222, 520.
[13] Act of 1898, § 38, Rule XXVII.
[14] Ib. §§ 12, 14, Rule XXXII.
[15] Ib. §§ 13, 15.

The choice of assignee was prescribed by section 5034 of the Revised Statutes,[1] and decisions under that section will be instructive. It was held that a creditor could not take part in the meeting until he had proved his debt.[2] Under the terms of paragraph *a* it would seem, in accordance with the decisions just cited, that no creditor could take part whose claim had not been allowed. The election of assignee was formerly by a majority of all creditors who had proved their debts,[3] so that the rule in this regard is changed.

The referee may continue the consideration of a claim if it is objected to or on his own motion (§ 57 d). It was held under the last act that the assignee should be appointed without waiting for the determination of this question, though a creditor thereby lost his vote, as it was the intention of Congress to appoint an assignee as speedily as possible,[4] and this decision would be followed under this act.

In proceedings on the bankruptcy of a partnership the trustee is to be chosen by the firm creditors (§ 5 b). If one partner is bankrupt, the joint creditors may vote for the assignee.[5]

Secured creditors were not allowed to vote for assignee unless they waived their security.[6] Secured creditors and those having priority are allowed to prove provisionally for the excess of the claim in order to take part in creditors' meetings (§ 57 e).

§ 520. **Act of 1898.** — SEC. 57. PROOF AND ALLOWANCE OF CLAIMS. — *a.* Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor,

[1] Act of 1867, § 13, 14 Stats. 522.

[2] Re Hill, 1 N. B. R. 16, Fed. Cas. No. 6481; Re Phelps, 1 N. B. R. 525, Fed. Cas. No. 11,071.

[3] Re Purvis, 1 N. B. R. 163, Fed. Cas. No. 11,476.

[4] Re Lake Superior Iron Co., 7 N. B. R. 376, Fed. Cas. No. 7997; Re Bartusch, 9 N. B. R. 478, Fed. Cas. No. 1086.

[5] Wilkins *v.* Davis, 15 N. B. R. 60, Fed. Cas. No. 17,664; Re Webb, 16 N. B. R. 258, Fed. Cas. No. 17,317.

[6] Re High, 3 N. B. R. 191, Fed. Cas. No. 6473. The law of California agrees with the provision of the present act. Widber *v.* Superior Court, 94 Cal. 430.

and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

b. Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

c. Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

d. Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

e. Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

f. Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

g. The claims of creditors who have received prefer-

ences shall not be allowed unless such creditors shall surrender their preferences.

h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

i. Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

j. Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

k. Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

l. Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the

claim if rejected in whole, or the proportional part thereof if rejected only in part.

m. The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n. Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

The provisions of clause *a* are the same as the first part of § 5077 of the Revised Statutes,[1] except for several verbal changes. The latter part of that section required the creditor to make oath that the proof was not made for the purpose of influencing the proceedings, and that no bargain had been made to vote for any particular person as assignee. The decision under the old law that the proof of a debt required an examination of the person offering the proof by the officer before whom the oath was taken [2] is not now in point.

A creditor could amend the proof of his debt when it was made by mistake,[3] and this would undoubtedly be allowed now.

The statement of the debt must be correctly entitled.[4] There must be an averment that the bankrupt is indebted to the creditor, and was so indebted before the filing of the peti-

[1] Formerly § 22 of the Act of 1867, 14 Stats. 527.

[2] Re Strauss, 2 N. B. R. 48, Fed. Cas. No. 13,532.

[3] Re Hubbard, 1 N. B. R. 679, Fed. Cas. No. 6813. See *supra*, § 217.

[4] Rule XXI. 1.

tion. The consideration of the debt must be alleged and also that there are no set-offs.[1] If the debt is secured, the securities must be stated;[2] and if there is no security, that fact is to be alleged.[3] Proof by a corporation shall be made by the treasurer or financial officer,[4] and contain an allegation of authority to make proof.[5] A partner proving a debt due to the firm must state that he is a member of the firm.[6] If proof be by an agent or attorney, there must be a statement of the reason why the principal did not make it.[7]

If a claim has been assigned before proof, the person who owned the claim at the time of beginning the bankruptcy proceedings must make the statement under oath which is required for proof of debts.[8] If assigned after proof, the referee must notify the original claimant and hear any objections which are made. If no objection is made, the assignee of the claim is to be subrogated to the original claimant.[9] Proof of assignment may be executed before the referee, a United States commissioner, or a notary public.[10]

The claim of a person contingently liable shall be made in the name of the creditor if known, otherwise in that of the person himself.[11] As to proof on bills and notes, see *supra*, § 176. In proving on a lost bill or note under paragraph *b* the circumstances of the loss must be shown, and it must be averred that the deponent has not been able to find it, and that the bill or note has not been negotiated or sold by any one.[12]

When dividends are paid on a claim founded on a bill or note, it is usual to indorse the amount on the note.[13]

Claims may be filed in court before as well as at the first meeting and after.[14] If they are filed with the trustee, he must send them to the referee.[15]

As to the objections to proof under paragraph *d*, see *supra*,

[1] Forms 31–36.
[2] Form 32.
[3] Form 31.
[4] Rule XXI. 1.
[5] Form 33.
[6] Rule XXI. 1, Form 34.
[7] Forms 35 and 36.
[8] Rule XXI. 3.
[9] Ib.
[10] Rule XXI. 5.
[11] Ib. 4.
[12] Form 37.
[13] *Supra*, § 224.
[14] Re Patterson, 1 N. B. R. 100, Fed. Cas. No. 10,814.
[15] Rule XXI. 1.

§ 210. Creditors may object to proofs by other creditors,[1] and it seems that the phrase "parties in interest" should be given a broad construction here, as in other places where it occurs.[2] Thus a person who had not proved his debt, or any one whose rights would be affected, should be allowed to object.

The court may continue the consideration of a claim to which no objection is made if there is cause for so doing. This may be done if the claim is of doubtful validity.[3]

If a secured creditor proved his debt without mentioning his security, he was held to have waived it.[4] This rule of decision should be followed; otherwise a secured creditor might get a dividend on his whole debt and have the advantage of his security also. The same principles apply to persons whose claims have priority, except that it would be easier for the trustee to detect any attempt at double satisfaction of the creditor's claim.

It is clear that paragraph *e* applies only to a provisional allowance of the claims, and the amount will be changed to suit the determination of the amount of the security.

Creditors having priority are not allowed to vote for the trustee except on a part of their debt which is not given priority.

If a secured creditor has proved his debt as if it were unsecured under a mistake, he may be allowed to withdraw the proof if the interests of other creditors have not been affected.[5]

The referee will have power under paragraph *f* to determine the question if claims are objected to, though his decision is subject to review by the court.[6]

A creditor who has been preferred under a voluntary assignment law allowing preferences some time before the passage of the bankrupt act, can prove his claim and vote without surrendering the amount paid.[7]

Paragraph *g* is declaratory of the law under the English and American systems of bankruptcy.[8]

[1] *Supra*, § 222.
[2] *Supra*, §§ 476, 478.
[3] Re Bartusch, 9 N. B. R. 478, Fed. Cas. No. 1086.
[4] *Supra*, § 422.
[5] Re Friedman, 1 N. B. N. 208.
[6] See Rule XII. 1, and *supra*, § 501.
[7] Re Folb, 91 Fed. Rep. 107, 1 N. B. N. 134.
[8] *Supra*, § 215.

The court has power under the provisions of paragraph *h* to regulate the manner of liquidation of securities,[1] but any agreement as to value will be adopted by the court if it is made in good faith.[2] It should be remembered that a secured creditor is not bound to prove in bankruptcy if he thinks his security is sufficient, or for any other reason does not wish to take part in the proceedings.[3]

The rule in bankruptcy has always been in conformity with that of paragraph *h*, that a secured creditor could have a dividend only on the excess of the debt over the security.[4]

The definition of secured creditors includes persons owning a debt where a surety for the bankrupt has security.[5] In such a case it will be incumbent on the creditor to make an arrangement with the surety for the valuation of his security. As the surety will not be released by the discharge of the bankrupt, it will be for his interest to have the security valued as low as possible, so that the creditor may recover as much as possible from the bankrupt, and leave only a small deficit to be made up by the surety.

The surety himself may prove against the bankrupt estate[6] if the creditor fails to do so, so that he can protect his rights in case of a dispute with the creditor who determines to proceed against the surety without proving.

Paragraph *i* is substantially the same as § 5070 of the Revised Statutes, which contained a part of § 19 of the Act of 1867.[7] That section enumerated the persons secondarily liable as "bail, surety, guarantor, or otherwise;" but the present law would have the same scope. The law was passed originally to allow a surety who paid after bankruptcy to prove;[8] and the last act was so expressed in terms, but it is evident from its phraseology that paragraph *i* was intended to cover a like case. As to what persons may prove under this section, see *supra*, §§ 173 *et seq.*

[1] *Supra*, § 399.
[2] *Supra*, § 415.
[3] *Supra*, § 397.
[4] *Supra*, § 404; Merrill *v.* Nat. Bank of Jacksonville, 173 U. S. 131. See especially the dissenting opinion of Mr. Justice Gray.
[5] *Supra*, § 464.
[6] Act of 1898, § 57 i.
[7] 14 Stats. 525.
[8] *Supra*, § 173.

Paragraph *j* authorizes proof of a penalty, if there be pecuniary loss. The rule under bankrupt laws has been that a penalty could not be proved unless it gave rise to a debt, as would be the case if the statute imposing the penalty authorized an action of debt to be brought.[1]

Paragraph *k* confers no authority to reconsider a claim which has been rejected, but this is provided for by § 2 (2), which seems to have somewhat broadened the right to reconsider claims, as it was the rule that a debt once rejected could not be proved.[2] It would be sufficient cause for reconsideration of an allowed claim that a creditor who had not been heard objected to the claim,[3] though not sufficient cause for rejection of the claim.

If a trustee or creditor desires the reconsideration of a claim which has been allowed, he may petition the referee. The referee will then make an order for re-examination of the claim, and give notice to the creditor of the hearing. After hearing the petition and examining any witnesses there may be, the referee will have power to reduce the amount of the claim, or expunge it altogether.[4]

The provisions of paragraph *l* are usual and necessary in order to enable the estate to be divided equally among all creditors.[5]

Paragraph *n* will do away with the cases, of which there have been several, where proof was not made for years after the beginning of bankruptcy proceedings. They occurred where assets were afterward discovered which made it worth while to prove.[6] The court is given no discretion in this matter, and has no power to admit proof more than a year after the adjudication. The prudent course, in view of this clause, is for the creditors to prove in every case, even though there are no assets, as there may be some in the future.

§ 521. **Act of 1898.** — SEC. 58. NOTICES TO CREDITORS. — *a*. Creditors shall have at least ten days'

[1] *Supra*, § 190.
[2] *Supra*, § 218.
[3] Ib.
[4] Rule XXI. 6. See Forms 38 and 39.
[5] *Supra*, § 218.
[6] *Supra*, § 205.

notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; and (8) the proposed dismissal of the proceedings.

b. Notice to creditors of the first meeting shall be published at least once, and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c. All notices shall be given by the referee, unless otherwise ordered by the judge.

The notice must be given to the creditors as prescribed by the statute, and when this is not done the proceedings at the first meeting are void.[1] But it was the rule under the last law that where a notice had been duly mailed to a creditor the statute had been complied with, although the creditor never received it;[2] and this would undoubtedly be followed. Similar principles apply to other notices besides those of the first meeting.

Notices will be sent to the address given in the proof of debt, unless the creditor files with the referee a request to have

[1] Re Hall, 2 N. B. R. 192, Fed. Cas. No. 5922.

[2] Re Stetson, 3 N. B. R. 726, Fed. Cas. No. 13,381.

it sent somewhere else.[1] Before the proof of debt is filed, the notice will be sent to the address of the creditor contained in the schedule of the debtor, as required by this section. For the form of the notice see No. 18 of the Supreme Court Forms. The notice of the hearing on the bankrupt's petition for a discharge must be published in a newspaper.[2] This notice is given by the clerk,[3] but all others are to be given by the referee.

The notice of time of payment of dividends is, by Form 41, required to be given by the trustee. Though the creditors are entitled under this section to notice of the declaration of dividends as well, the notice will be of small value to them, and no practical hardship would be done if the notice were omitted. The creditors have not the power now to declare dividends as they had under the Act of 1867.[4] The referee declares dividends at present.[5]

§ 522. **Act of 1898.** — SEC. 59. WHO MAY FILE AND DISMISS PETITIONS. — *a.* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b. Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over, or if all of the creditors of such persons are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

c. Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

d. If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners

[1] Rule XXI 2.
[2] Form 57.
[3] Ib.
[4] § 27, 14 Stats. 529, R. S. § 5092.
[5] Act of 1898, § 39 a (1).

therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

e. In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition, or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

f. Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

g. A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.

A debtor in his petition to be adjudged a bankrupt must state his occupation and his place of business. He must allege his inability to pay his debts in full, and his willingness to surrender his property for his creditors. He must also allege

that his schedules contain a full statement of his debts and property. The petition concludes with a prayer that he may be adjudged a bankrupt.[1] It must be under oath, which may be taken before a referee or any person authorized to administer oaths.[2] As to the requirements of the schedules, see *supra*, § 470.

The form of a partnership petition is similar.[3]

The oath to a petition must be taken by the creditors themselves, and not by their attorneys, but an answer will waive the right to object to a petition on this ground.[4]

It will be convenient here to consider the necessary allegations of the creditors' petition, which we will discuss in the order in which they occur in Form No. 3. Three creditors must join in a petition unless there are less than twelve creditors in all, exclusive of employees or relatives within the third degree; in that case one creditor may petition alone. The names of the creditors and their residences are to be stated. If one creditor petitions alone under the rule just referred to, the facts giving him a right to do so should be stated. It is in an exceptional case only that one creditor can petition, and he must show his authority. Paragraph *d* of this section contemplates the necessity of such an allegation.

The debtor's place of residence is to be stated; and it need not be alleged that it is within the district, as in many cases a debtor may be put into bankruptcy in the district where his principal place of business is situated, although he resides in another district. In some cases also a court will have jurisdiction if the debtor has had his principal place of business, resided, or had his domicile within the district for the greater part of the next preceding six months, although at the time of filing the petition he has left the district.[5] The creditors may apparently bring the petition in the district of the debtor's place of business or of his residence, where these are different. It must be stated that the debtor has his principal place of business

[1] Form 1.
[2] Act of 1898, § 20.
[3] Form 2. See Mather *v.* Coe, 92 Fed. Rep. 333.
[4] Re Simonson, 92 Fed. Rep. 904, 1 N. B. N. 230.
[5] *Supra*, § 465.

within the district, or that he resides there. Residence and domicile are probably equivalent expressions.[1]

It has been held that the fact of residence or domicile or having a place of business must be stated positively or conjunctively, but not disjunctively.[2] Thus it is not sufficient to follow the phraseology of § 2 (1) by alleging that the debtor has his principal place of business, resides, *or* has his domicile, within the district, because there is no positive statement of any one of these facts. But it would be sufficient to allege that the debtor had his principal place of business *and* resided within the district. An allegation of either of these facts alone would also be enough. If a person has several places of business in different districts, the petition can be brought in that district only where his principal office is.[3] An allegation that the person proceeded against owes debts to the amount of one thousand dollars is necessary.

All natural persons except wage-earners and farmers are subject to the involuntary features of the act, and so are all unincorporated companies.[4] It is not necessary to allege that the person proceeded against does not come within the exception. It has been thought that the rule as to corporations should be different, and a learned author has argued ably in support of this contention.[5] Corporations engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, are made subject to the act as involuntary bankrupts.[6] As such corporations include almost all private corporations, it would not seem necessary to allege that a corporation proceeded against came within the scope of the act. The exceptions are no more in number in the case of corporations than in that of natural persons, and similar principles should apply to each. If the corporation does not come within the classes mentioned in the act, that is a matter of defence to be set up in the answer.

Form No. 3 requires that the creditors should state the nature

[1] *Supra*, § 26.
[2] Re Laskaris, 1 N. B. N. 209.
[3] *Supra*, § 465.
[4] Act of 1898, § 4 b.
[5] See an article by Wm. M. Collier, Esq. 1 N. B. N. 62.
[6] Act of 1898, § 4 b.

and amount of their claims. This will give the debtor a chance to prove that the debts are not provable or are not of the required amount. The next requirement of the petition is that the debtor should be alleged to be insolvent,[1] and that within four months before the filing of the petition he committed an act of bankruptcy. There is one case not covered by Form No. 3, where a petition may be filed though the act was done more than four months before the petition was filed. When the act of bankruptcy relied on is a transfer to defeat creditors or to give a preference, or a general assignment, and such transfer or assignment is required or permitted to be recorded, the petition may be filed at any time within four months of the recording.[2] If the creditors rely on a transaction of this sort, the Form should be changed to set up the circumstances. In case the recording of such a transfer is not permitted, the time for filing a petition does not lapse till four months after open and notorious posesssion is taken by the transferee, unless the creditor knows of the transfer. In this case also the Form will be changed to suit the facts, and the creditors should be careful to make the allegation in the form required by § 3 *b*.

The date of the act of bankruptcy must be set down and the act itself described. The necessary allegations will depend on the nature of the act. Five acts of bankruptcy are enumerated in § 3[3]: (*a*) a transfer or concealment of property to hinder creditors, (*b*) a transfer to prefer a creditor, (*c*) allowing a preference to be obtained by legal proceedings, (*d*) making a general assignment, (*e*) admitting in writing inability to pay debts and willingness to be adjudged a bankrupt. These acts of bankruptcy have been discussed before, and the reader is referred to § 466 for a consideration of them. The allegations in each case should correspond closely with the terms of the act and contain all necessary averments, since acts of bankruptcy are construed strictly. It should be remembered also that if the second or third act of bankruptcy is relied on, the debtor must be proved to be insolvent at the

[1] See Form 3.

[2] Act of 1898, § 3 b. *supra*, § 466.

[3] *Supra*, § 466.

time of its commission, but this is not necessary in the other cases. It will be necessary therefore in the second or third cases to allege insolvency at the time the act of bankruptcy took place, but not in the other instances.

The foot-note to Form 3 requiring schedules to be annexed to the creditor's petition is a mistake. The Act of 1898 requires the debtor to file the schedules within ten days.[1] By Rule IX. the creditor must file them within five days after the adjudication, if the debtor cannot be found. But in no case under the act or the rules need they be filed with the petition.

A petition should not contain also causes of action against third parties which might perhaps give the trustee a right to proceed. Such actions can only be brought by a trustee, and a petition which embraces them is multifarious.[2]

As to those who may file a petition in bankruptcy, see *supra*, §§ 15 *et seq.*, 44 and 467.

Under paragraph *b* any one may petition who could bring an action on the debt in respect to which he petitions.[3] It was formerly doubted whether a secured creditor could petition, but this clause includes such a person if he has a large enough unsecured debt. Creditors may be estopped to petition if they have assented to the act of bankruptcy,[4] and preferred creditors cannot prove without surrendering their preferences (§ 57 *g*), and therefore can not petition without surrendering.[5]

The court may permit amendments except when a new act of bankruptcy is alleged more than four months after its commission.[6]

Under the last act it was held in several cases that a partly secured creditor might petition if he had an unsecured debt of a sufficient amount,[7] or that he might waive his security and petition.[8] Accordingly, where a creditor whose debt was wholly

[1] Act of 1898, § 7 (8); *supra*, § 470.
[2] Mather *v.* Coe, 92 Fed. Rep. 333.
[3] *Supra*, § 44.
[4] *Supra*, § 51.
[5] *Supra*, § 52.
[6] *Supra*, § 48, and see Rule XI.
[7] Re Alexander, 1 Lowell, 470, Fed. Cas. No. 161; Re California Pacific R. R., 3 Sawy. 240, Fed. Cas. No. 2315. See Re Bouton, 5 Sawy. 427, Fed. Cas. 1706.
[8] Re Stansell, 6 N. B. R. 183, Fed. Cas. No. 13,293; Re Frost, 6 Biss. 213, Fed. Cas. No. 5134.

secured petitioned, it was held that he waived his security if he did not mention it.[1] These decisions are not authorities for the interpretation of § 59, because it is there provided that the debts due must be in excess of any securities. There might be a question whether a secured creditor could waive his security and petition, but it is more reasonable to construe the section as meaning only those securities which are held by creditors under a claim of right. If a creditor waives his security, he no longer holds it.

One creditor who owned debts of the value of two hundred and fifty dollars could bring a petition under § 39 of the Act of 1867.[2] This was changed in 1874.[3] After that one fourth in number of the creditors, representing one third in value of the debts, had to join.

The creditor's petition must allege that the debtor has his principal place of business, resides or is domiciled within the district, and owes debts to the amount of one thousand dollars; that the petitioners are creditors having provable claims of five hundred dollars. The petition must further allege that the debtor is insolvent and has committed an act of bankruptcy within four months. It ends with a prayer for service of the petition on the debtor and his adjudication as a bankrupt.[4]

It is not a sufficient answer to the allegation that the petitioning creditors had provable claims of five hundred dollars, to say that at the time of committing the act of bankruptcy they did not have claims to that amount.[5]

Paragraph *c* requires the petition to be filed in duplicate, but three copies of the schedules must be filed.[6]

By the terms of paragraph *e* the employees and relations of the bankrupt are not to be counted if they have not joined in the petition. The implication is that they are to be counted if they have joined. As to those who are relations within the third degree, see *supra*, § 497.

[1] Re Bloss, 4 N. B. R. 147, Fed. Cas. No. 1562; Re Broich, 7 Biss. 303, Fed. Cas. No. 1921.

[2] 14 Stats. 536, R. S. § 5021. See *supra*, § 45.

[3] Act of June 22, 1874, c. 390, § 12; 18 Stats. 180.

[4] Form 3.

[5] Re Etheridge Furniture Co., 92 Fed. Rep. 329.

[6] Act of 1898, § 7 (8).

Since all creditors are interested in a petition in bankruptcy it has always been the rule to allow them to join in the petition after it has been brought,[1] and such is the rule of paragraph *f*.

Attaching creditors are usually allowed to oppose a petition[2] and so are other persons whose rights are affected.[3] The right to intervene is limited by this paragraph to creditors, who are defined to be persons having provable claims.[4]

Creditors may join in a petition after it is filed, though they do so more than four months after the act of bankruptcy relied on was committed.[5] A singular result of this decision is that a petition which was not valid when filed because not joined in by the requisite number of creditors may be made good by a subsequent joinder.[6] This fact might be of importance to a creditor who learned of an act of bankruptcy of his debtor when the term of four months had nearly expired and there was no time to get two other creditors to join before filing the petition. The soundness of the decision seems doubtful. If correct it would enable the creditors to disregard the provisions of § 59 *b* that a petition must be joined in by three creditors. The law of England is different from that of the principal case.[7]

It has been the practice in some cases independent of statutory enactment to refuse to dismiss a petition without notice to creditors.[8] This is now provided for by paragraph *g*.

A petitioning creditor could not receive payment for his debt,[9] because after proceedings were begun any creditor might carry them on; a payment to the petitioning creditor could be recovered by the trustee.[10] Therefore it was no defence to a

[1] *Supra*, § 49. See Re Etheridge Furniture Co., 92 Fed. Rep. 329, 1 N. B. N. 139.

[2] Re Williams, 14 N. B. R. 132, Fed. Cas. No. 17,706; Re Scrafford, 14 N. B. R. 184, Fed. Cas. No. 12,557; Merriam *v.* Sewall, 8 Gray, 316; Farris *v.* Richardson, 6 Allen, 118.

[3] Re Derby, 8 N. B. R. 106, Fed. Cas. No. 3815; Re Boston, Hartford & Erie R. R. 9 Blatch. 101, Fed. Cas. No. 1677.

[4] Act of 1898, § 1 (9).

[5] Re Romanow, 92 Fed. Rep. 510, 1 N. B. N. 213.

[6] Ib.

[7] Re Maund (1895), 1 Q. B. 194.

[8] *Supra*, § 56.

[9] Ex parte Parr, 1 Dea. 77; Ex parte Jones, 3 Dea. & Ch. 697.

[10] Ex parte Jay, L. R. 9 Ch. 133.

petition that a tender of the amount due the petitioner had been made to him.[1]

§ 523. **Act of 1898.** — SEC. 60. PREFERRED CREDITORS. *a.* A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

b. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

c. If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

d. If a debtor shall directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and

[1] Re Williams, 1 Low. 406, Fed. Cas. No. 17,703; Re Ouimette, 1 Sawy. 47, Fed. Cas. No. 10,622.

counsellor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

The former law prescribed a different limit of time for proceeding against a debtor on the ground of his having given a preference and for upsetting such a transaction by an assignee. Section 39 of the act of 1867 [1] provided that the petition might be brought against a bankrupt within six months, but by § 35 [2] a preference could be avoided by the assignee within four months only. This was subsequently reduced to two months.[3] In the present act the time is four months in each case.[4]

Section 60 relates to the avoidance of preferences by trustees and is in several important particulars different from the corresponding provisions of the former law. In the first place, this fraud can now be avoided only when the debtor is insolvent. In this respect it is the same as a preference regarded as an act of bankruptcy.[5] Formerly the creditor must have had knowledge that a fraud was intended and reasonable cause to believe the debtor was insolvent.[6] The Act of 1867 before its revision was more like the present act, but by its terms the creditor must have had reasonable cause to believe the debtor insolvent, as well as reasonable cause to believe a fraud was intended.

Insolvency is defined in the act (§ 1–15); if a person is not insolvent within this definition he can not be put into bankruptcy, and questions under this section can not arise. The cases as to "contemplation of insolvency" are not now in point.[7]

[1] 14 Stats. 536, R. S. § 5021.
[2] 14 Stats. 536, R. S. § 5128.
[3] Act of June 22, 1874, c. 390, § 10, 18 Stats. 180.
[4] Act of 1898, § 3 b, § 60 b.
[5] *Supra*, § 466.
[6] R. S. § 5128.
[7] *Supra*, 466.

The word "transfer" will cover all methods of disposing of property, (§ 1–25), and in connection with the terms of paragraph *b* will enable the trustee to set aside indirect preferences, so that the result will be the same as under the former statute where the words "directly or indirectly" were used. [1]

By considering paragraphs *a* and *b* together it will appear that in order that the transfer or judgment may be set aside by the trustee, it must have been given with an intent to prefer. In this respect this section differs from § 3 (3), under which an act of bankruptcy may be committed by mere inaction without any intent to prefer.[2] As to intent see *supra*, §§ 71 *et seq.*

The expression in the former act was that the transaction was "void," but this was held to mean "voidable," and the present section is in this respect only declaratory.[3]

While it is not necessary under this section for the trustee to show that the creditor knew the debtor was insolvent, if he does succeed in so doing it will be presumed that the creditor knew a preference was intended.[4]

A surety may be preferred if a transfer is made with his knowledge to the person primarily liable. This was the law under the last act [5] and will be under the present one, as a surety is a person "benefited thereby."

It is provided by § 3 *b* that a transfer of property which requires recording shall date from the day it is recorded, and a petition may be brought within four months after that. It does not seem to be the intention of Congress to have this provision apply to § 60. By paragraph *a* of that section a preference is complete as soon as given, and the provision as to recording extends the time within which a petition can be filed, but does not enact that the transfer shall not be a preference until recorded. And in clause *b* of § 60 there is no provision similar to that of § 3. One result of this will be that a preference which has been kept off the record may

[1] Act of 1867, § 35, 14 Stats. 536, R. S. § 5128. See *supra*, § 466.
[2] *Supra*, § 466.
[3] *Supra*, §§ 75, 94.
[4] *Supra*, § 79.
[5] *Supra*, § 81.

be a good foundation for a petition and yet the trustee when appointed will not be able to set it aside.

As to what facts are sufficient to show that the creditor had reasonable cause to believe that a preference was intended, see *supra*, § 99. The cases there cited are useful but are not precisely in point because the requirements of creditor's knowledge and belief were different under the Act of 1867.

If the creditor's agent had reasonable cause for belief the creditor will be bound. This provision will clear up the confusion which might arise from a misunderstanding of the decision of the Supreme Court in Hoover *v.* Wise.[1]

Questions under this section will arise often in suits brought by the trustee directly against a creditor. If such a suit is brought at law, the questions of insolvency, intent, and reasonable cause to believe are for the jury.[2] The burden of proof lies on the trustee.[3]

Paragraph *c* provides that a creditor who has been preferred and afterwards in good faith gives property to the debtor on credit may set off the amount in a suit by the trustee against him to recover the preference. The provision means that if the creditor gives property to a debtor for his own use or to be used in his business he may have the set-off. But if he gives it to the debtor for the purpose of being used to prefer another creditor or to defeat the act he may not have the set-off. This appears from the requirement that the property should become a part of the debtor's estate. The good faith exacted of the creditor must mean that he is not a party to any scheme to defraud. It cannot mean that he is ignorant of the debtor's affairs, because in that case there could be no recovery by the trustee on the original preference. Apparently the creditor takes the risk that the property shall not be fraudulently transferred by the debtor. The clause states unconditionally that the property must become part of the debtor's estate.

Paragraph *d* allows a debtor to give a reasonable fee to his

[1] 91 U. S. 308, *supra*, § 100.
[2] *Supra*, § 104.
[3] Re Laurie, 5 Manson, 48; Barbour *v.* Priest, 103 U. S. 293; Akers *v.* Rowan, 33 So. Car. 451.

counsel. It has always been the rule in this country that a bankrupt could give a reasonable sum to an attorney for legal services.[1] The English law is more strict and limits the sum to a payment for services up to the time of adjudication.[2] This depends largely on the fact that bankruptcy is a revocation of a solicitor's authority to pay money.[3]

[1] See *supra*, § 88.

[2] Re Pollitt, 9 Morrell, 309. See Re Beyts, 1 Manson, 56; Re Charlwood (1894), 1 Q. B. 643; Re Whitlock, 1 Manson, 33; Re Simonson (1894), 1 Q. B. 433; Re White, 5 Manson, 17.

[3] *Supra*, §§ 386, 389.

CHAPTER VII.

ESTATES.

§ 524. **Act of 1898.** — SEC. 61. DEPOSITORIES FOR MONEY. — *a.* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

Under the Act of 1867, Rule XXVIII. of the Supreme Court provided that the district courts should designate depositories for money. They were required to be national banks if possible. There is nothing in the present act or the General Orders of the Supreme Court which requires this. It was probably intended that the depositories should usually be national banks, since in the only place where they are mentioned they are described as national banks.[1]

§ 525. **Act of 1898.** — SEC. 62. EXPENSES OF ADMINISTERING ESTATES. — *a.* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath,

[1] See Form 61.

and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

The cost of administering the estate is to be paid in full after taxes, cost of preserving the estate and filing fees (§ 64 *b* (3)).

The clerk, marshal or referee need not incur any expense unless he is given indemnity for it.[1]

§ 526. **Act of 1898.** — SEC. 63. DEBTS WHICH MAY BE PROVED. — *a.* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

[1] Rule X.

b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

The phraseology of this section is very different from that of the preceding act. The first and most important question is whether contingent debts are provable. They are not expressly mentioned as they were in the acts of 1841[1] and 1867.[2] But, as we have seen, one class of contingent debts — that of persons secondarily liable — may be proved.[3] This is an indication that Congress did not mean to exclude such debts altogether. Clause 4 of § 63 is expressed in terms broad enough to cover contingent debts, and in paragraph *b* there is a provision for liquidation of debts. This would also apply to debts absolutely due, but it is significant in this connection that in § 19 of the Act of 1867 the term "liquidation" was applied to contingent debts as well as others. For these reasons, and because it is necessary to the establishment of a satisfactory bankruptcy system that the court should have power to wind up all the affairs of a bankrupt, it would seem that Congress intended to include contingent debts. The Supreme Court has taken this view of the act, as they have provided for the proof of such debts.[4] But if a contingent liability is not capable of valuation, it will not be provable.[5] Future rent can not be proved.[6]

Section 63 omits an important class of debts which were included under the last act. Demands for goods converted by the debtor are not included. The unfortunate result is, that it is in the power of the creditor to waive the tort and prove for the value of the goods, or sue the debtor on a cause of action to which his discharge is not a bar.[7]

Clause 1 will include bills, notes and judgments. It makes no difference whether the action on which the judgment was

[1] § 5, 5 Stats. 444.
[2] § 19, 14 Stats. 525, R. S. § 5068.
[3] *Supra*, § 520.
[4] Rule XXI. 4.
[5] *Supra*, §§ 167, 171.
[6] *Supra*, § 169, Re Jefferson, 1 N. B. N. 288.
[7] *Supra*, § 178.

recovered was for a debt provable in bankruptcy. A judgment in an action of tort is provable.[1]

Clause 2 has changed the former rule in this country.[2]

There was no provision like clause 3 in the last act, but the courts allowed such claims in some cases.[3]

Clause 4 will include many demands against the estate of the bankrupt and should be construed to cover contingent liabilities. In case of demands founded on an open account where it is not clear what the amount is, the demand may be liquidated by the court. Contingent liabilities are to be proved in the name of the creditor if possible, and in no case will a dividend be paid unless it be proved that the original debt will be thereby diminished.[4] The proof of debts on open account shall state when they will mature, and if there are debts maturing at different dates, the average due date shall be stated.[5]

Equitable debts have been proved under most systems of bankruptcy.[6] It is evident that Congress contemplated the proof of some equitable debts because it made provision for the proof of the estate of partners against the partnership estate (§ 5 *g*). Cases in which there is really a contract, though for technical reasons the remedy is in equity, would be covered by this clause. Thus the right of a wife to recover for money lent her husband.[7]

The terms of clause 4 relate only to contracts made by the parties themselves. This clause will not therefore cover that large class of actions on contracts implied in law which are sometimes called "implied contracts." Liabilities of this kind are imposed on the parties irrespective of any contract between them. They are not really contracts at all and are now more usually called quasi-contracts.[8] The precise point arising under this clause has been decided in New York, where it was held that a statute containing the phrase "con-

[1] *Supra*, § 177.
[2] *Supra*, § 187.
[3] *Supra*, § 343.
[4] Rule XXI. 4.
[5] Rule XXI. 1.
[6] *Supra*, § 179.
[7] *Supra*, § 181.
[8] For a very able treatment of this subject, see Keener on Quasi-Contracts.

tract express or implied," did not cover the case of a contract implied by law.[1]

There was a great difference of opinion whether a judgment obtained pending bankruptcy proceedings could be proved under the Act of 1867.[2] The Supreme Court finally decided that such a judgment was provable.[3] Clause 5 has adopted this rule, except that the debt is now to be proved and not the judgment.[4]

Besides the debts mentioned in § 63, the act provides for the proof of debts of secured creditors and sureties and of debts arising as a penalty.[5] Preferred creditors are not allowed to prove unless they surrender their preferences.[6]

Paragraph *b* does not enlarge the class of debts which may be proved, but provides, that if any claim coming within the scope of paragraph *a* is unliquidated, it may be liquidated and proved. The use of the word "claims" shows that it was not intended to include causes of action arising out of tort. The Act of 1867[7] included "unliquidated damages" in actions of tort for conversion. The difference in phraseology is significant.

If this clause were interpreted in the other way it would include all actions for tort, whether property were involved or not. No bankrupt law has ever done this,[8] and it would be a strange anomaly if Congress should have extended in this direction the scope of the law which is so much more restricted in other respects than former laws. The word "claim" is used in this country as a synonym for "demand" or "debt."[9] In the numerous instances where it occurs in this act it has the same meaning.[10] The provisions of § 17 also throw light on the meaning of paragraph *b*. It is there enacted that a discharge shall release a bankrupt from all his provable

[1] Dusenbury *v.* Speir, 77 N. Y. 144.

[2] *Supra*, § 226. See also the cases cited on both sides in the argument of Boynton *v.* Ball, 121 U. S. 457. Freeman, Judgments, 4th ed. § 245.

[3] Boynton *v.* Ball, 121 U. S. 457.

[4] Re Pinkel, 1 N. B. N. 138.

[5] Act of 1898, § 57 h, i, j. See *supra*, § 520.

[6] Ib. § 57 g.

[7] § 19, 14 Stats. 525, R. S. § 5067.

[8] *Supra*, § 186.

[9] *Supra*, § 220.

[10] See § 1 (9) & (11), § 2 (2), § 9, § 25, § 55 b, d, e, § 56, § 57.

debts except, among other things, judgments for wilful and malicious injuries to the person or property of another. The inference is plain that Congress did not intend that a cause of action in tort should give rise to a provable debt till it was reduced to judgment. Because otherwise it would have included such causes of action in § 17, as it is incredible that Congress should intend to release the debtor from liability for a tort but not from liability on a judgment for a tort. These considerations show conclusively that Congress did not intend to include torts within the scope of paragraph *b*.

§ 527. **Act of 1898.** — SEC. 64. DEBTS WHICH HAVE PRIORITY. — *a*. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b. The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein

prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

c. In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

The provisions of paragraphs *a* and *b* are somewhat similar to those of § 28 of the former act,[1] but the order of priority is different.

It has been held that taxes on a homestead which is exempted from the operation of the bankrupt act should be paid by the trustee,[2] and also taxes on a bankrupt's property, part of which is exempt.[3]

The provisions of the former act gave priority to debts due the United States as well as taxes,[4] but the result will be the same because Revised Statutes § 3466 gives such priority independent of the bankrupt law.[5] Debts as well as taxes due a State were also included. There is nothing which would give such a debt priority at present, unless the state law contained a provision to that effect.

[1] 14 Stats. 530, R. S. § 5101.
[2] Re Tilden, 91 Fed. Rep. 500.
[3] Re Baker, 1 N. B. N. 212.
[4] Act of 1867, § 28, 14 Stats. 530, R. S. § 5101.
[5] Lewis *v.* U. S., 92 U. S. 618. *Supra*, §§ 228 *et seq.*

The terms of clause 1, paragraph *b*, would undoubtedly include the expenses of a receiver appointed to preserve the estate under the authority of § 2 (3).

In a contested case the petitioning creditor may recover his costs if the debtor is adjudged a bankrupt.[1] This does not include counsel fees.[2] Costs are to be paid out of the estate and would undoubtedly be given priority together with the filing fee under clause 2.

Clause 3 will cover the expenses of officers in administering the estate,[3] such as the publication of notices, the taking of testimony, travelling expenses and the fees of marshals in serving warrants.[4] There is no express provision for the allowance of an attorney's fee to the trustee, but a reasonable fee should be allowed for services necessary in the administration of the estate. Such was the rule under the Act of 1867.[5] The expenses of a trustee in administering the estate may be allowed under § 62, since a trustee is an officer.[6] Under this section, and by virtue of Rule XXXV. 3, the trustee should be allowed counsel fees.[7] It has been held that where the trustee is a lawyer, he may receive compensation for his own services as counsel.[8]

The bankrupt is allowed services of counsel in performing the duties imposed on him by the act, and a reasonable attorney's fee will be paid.[9] In voluntary cases fees will be allowed for an attorney's services which have been of benefit to the estate.[10]

Clause 4 differs in terms from the last law, which gave priority to the extent of fifty dollars for work done six months before the publication of notice of proceedings in bankruptcy.[11] Operatives, clerks or house-servants were entitled to this priority, but the terms of the present law would include the same persons. Workmen will have priority up to three hun-

[1] Rule XXXIV.
[2] Re Ghiglione, 93 Fed. Rep. 186.
[3] Act of 1898, § 62.
[4] See Rules X., XXVI.
[5] See *ante*, § 510. See also Cadwell's Assignment, 89 Iowa, 533.
[6] Act of 1898, § 1 (18).
[7] See *ante*, § 511.
[8] Re Mitchell, 1 N. B. N. 264.
[9] Re Michel, 1 N. B. N. 265.
[10] Re Beck, 92 Fed. Rep. 889.
[11] Act of 1867, § 28, 14 Stats. 530, R. S. § 5101.

dred dollars only, though under the law of the state they have priority to a greater amount, and clause 5 provides for a recognition of these state laws.[1] Under this clause workmen, clerks or servants will have priority only for wages earned for three months before the proceedings, but where a firm stopped business in August, 1898, and a petition against it could not be filed till November 1, 1898, it was held that the workmen were entitled to priority for the three months preceding the stoppage of business.[2]

The claim of a person who manufactures cheese under a contract with the bankrupt is not entitled to priority under this clause, though the person performs manual labor himself.[3] In this case he made the cheese in his own dairy and employed his servants to help him. He was in the position of an independent manufacturer and did not occupy the relation of a workman, clerk or servant. But the fact that the work is not done in the shop of the employer is of no consequence. Thus a person who made shoes at his own home out of leather furnished by the employer was held to be an "operative," entitled to priority under an insolvent law of Massachusetts.[4]

The courts have always construed similar provisions of bankrupt laws in a liberal manner. Thus a person hired to examine the books of a bankrupt was held to be entitled to priority as a "clerk."[5] And under a statute giving precedence to claims of clerks and servants, it was held that the mate of a vessel was a servant of the owner,[6] and a travelling man was a clerk or servant of the person by whom he was employed.[7] The editor and members of the staff of a newspaper are clerks or servants of the owner of the paper.[8]

Under the Act of 1867 persons having priority under a state law were not given priority in bankruptcy.[9] Clause 5 has changed the old law in this respect.

[1] Re Rouse, 91 Fed. Rep. 96, 1 N. B. N. 75.

[2] Re Rouse, 91 Fed. Rep. 514.

[3] Re Rose, 1 N. B. N. 212.

[4] Thayer *v.* Mann, 2 Cush. 371.

[5] Ex parte Rockett, 2 Lowell, 522, Fed. Cas. No. 11,977.

[6] Ex parte Homborg, 2 M. D. & De G. 642.

[7] Ex parte Neal, Mont. & McA. 194.

[8] Ex parte Jennings, 7 L. T. N. S. 601; Ex parte Chipchase, 11 W. R. 11.

[9] Re Stuyvesant Bank, 9 N. B. R. 318, Fed. Cas. No. 13,584, 10 N. B. R. 399, Fed. Cas. No. 13,583.

The provision of paragraph *c* resembles the law in England relating to an undischarged bankrupt. The property acquired by him after the bankruptcy is liable for his old debts, but if the trustees have allowed him to trade, the new creditors are given the first right against this property.[1]

The trustee becomes the owner of all the property which a bankrupt had at the date of the adjudication (§ 70). And the new trustee who is to be chosen after a discharge is revoked (§ 44) will take all the property[2] and distribute it as provided in paragraph *c*. There is some doubt under the terms of this clause what should be done with property acquired by a bankrupt after adjudication and before the confirmation of a composition. The intention undoubtedly was to have the same rule in the case of compositions as of discharges. The confusion arose perhaps from the fact that under the act of 1874,[3] a composition might be offered and confirmed before the adjudication. The rule on this point is different at present.[4]

There is some doubt under the present act whether the trustee takes the title to the bankrupt's property which he acquires after the date of the adjudication. The doubt arises from the peculiar wording of the sections relating to the effect of the confirmation of a composition.[5] In the present paragraph the adjudication is indicated as the time from which the bankrupt owns the property in case of revocation of a discharge. This circumstance shows that Congress intended the title of the trustee to stop at the adjudication, otherwise the limit would have been set at the time of granting the discharge. The law in this country has always been that the debtor owned the property acquired after his bankruptcy,[6] and if Congress had intended to change the law it would have done so in express terms.[7]

[1] *Supra*, §§ 345, 350.

[2] Act of 1898, § 70 d.

[3] Act of June 22, 1874, c. 390, § 17, 18 Stats. 182.

[4] *Supra*, § 475.

[5] Act of 1898, § 21 g, § 70 f, and the present paragraph.

[6] *Supra*, § 366.

[7] In Re Smith, 1 N. B. N. 136, Mr. Referee Hotchkiss allowed an undischarged bankrupt to prove a debt in another bankruptcy, on the ground that the property acquired after the adjudication belonged to him.

§ 528. **Act of 1898.** — SEC. 65. DECLARATION AND PAYMENT OF DIVIDENDS. — *a.* Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

b. The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order.

c. The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

d. Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.

e. A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act.

Under the former act, § 27[1] provided that dividends should be declared by a meeting of creditors, except that under certain circumstances the assignee should do so. This is now done by the referee.[2]

The terms of paragraph *a* are broad enough to cover all secured claims whether they have been allowed as to the unsecured part or not. It was certainly not intended, however, to prevent a creditor receiving a dividend on a part of his debt which was not secured. This is provided for in § 57 *h*.

By § 58 creditors are entitled to ten days' notice of the "declaration and time of payment of dividends." The same section provides that the referee shall give all notices unless otherwise ordered by the judge. Form 41 provides for the notice of payment of a dividend; it is to be given by the trustee. As the trustee gives the notice of time of payment there is no need of the referee giving notice also. There remains, however, the notice of declaration of the dividend. The dividend is to be declared by the referee without consultation with creditors.[3] The notice of declaration, therefore, is a mere form, and no creditor's rights will in any way be affected if this notice be omitted. Such notice would therefore seem unnecessary.

Paragraph *b* is not very clear. A strict construction of its terms would require the trustee to keep back money enough to pay in full not only the claims having priority but also all claims which "have not been, but probably will be, allowed." In this way a large sum of money might be tied up to await the future action of creditors in proving claims which have been scheduled. The intent of the section, however, seems to be to require the trustee to hold back enough money to pay in full the claims having priority, and on all claims which may be proved and allowed afterwards a dividend equal to that declared on the claims already allowed. Such a construction would be more reasonable. The section is silent on the question how the referee is to tell what claims may in future be allowed. The only way he has to tell is by the help of the schedule, and

[1] 14 Stats. 529, R. S. § 5092.
[2] Act of 1898, § 39 a (1).
[3] Ib.

it is therefore his duty to reserve enough money to pay a dividend on all scheduled claims before declaring a dividend.

The meeting for the determination of dividends was under the Act of 1867 to be held within three months. The present law requires a very speedy settlement of the estate. The trustee must pay dividends within ten days after they are declared.[1] It will therefore be his duty to pay the dividend very soon after his appointment, which is to take place at the first meeting of creditors,[2] not more than thirty days after the adjudication.[3]

The rule of clause *c* was also contained in § 28 of the Act of 1867.[4] It appears from this provision that claims may be proved subsequently to the first meeting, though this is nowhere specifically enacted. Claims cannot be proved more than a year after the adjudication, except in case of infants and insane persons.[5]

The terms of clause *d*, if strictly construed, would allow a citizen of the United States who had proved in the foreign bankruptcy to prove in the United States also before foreign creditors, but this was undoubtedly not so intended.

It is the principal reason for a bankrupt law that the debtor's effects may be divided equally among the creditors. Clause *e* was apparently introduced out of abundant caution, as there would be no doubt that the result would have been the same without it.[6]

§ 529. **Act of 1898.** — SEC. 66. UNCLAIMED DIVIDENDS. — *a*. Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b. Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full

[1] Act of 1898, § 47 a (9).
[2] Ib. § 44.
[3] Ib. § 55 a.
[4] 14 Stats. 530, R. S. 5097.
[5] Act of 1898, § 57 n.
[6] *Supra*, § 216.

the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

One chief purpose of the present law is to close up the estate of a bankrupt as speedily as possible, and Congress has framed many of the provisions of the act with this end in view. Thus the petition is returnable within fifteen days,[1] and the pleadings must be filed within ten days afterward.[2] The adjudication is then to be made as soon as possible.[3] The trustee is appointed at the first meeting held within thirty days of the adjudication.[4] Dividends are declared also within thirty days of the adjudication, and the trustee must pay them within ten days.[5] Claims must be proved within a year,[6] and the estate closed as quickly as possible.[7] And by the present section a dividend remaining unclaimed for eighteen months after the final dividend is declared is to be paid over to the other creditors. A discharge must be applied for within a year.[8]

§ 530. **Act of 1898.** — SEC. 67. LIENS. — *a*. Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

b. Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

[1] Act of 1898, § 18 a.
[2] Ib. § 18 b.
[3] Ib. § 18 d.
[4] Ib. § 55 a.
[5] Ib. § 47 a (9).
[6] Ib. § 57 n.
[7] Ib. § 47 a (2).
[8] Ib. § 14 a.

c. A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act.

e. That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of

this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.

f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the

same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

The provision of paragraph *a* is unnecessary, since the trustee has all the rights which the creditors have. These rights he has as the representative of the creditors.[1]

Paragraph *b* apparently relates to a case where the bankrupt has fraudulently created a lien on his estate, since a lien acquired in good faith by a creditor does not give another creditor a cause of action. If bankruptcy occurs within four months, the trustee may set the transaction aside as a preference; otherwise there is no remedy. If this paragraph be construed as giving the trustee rights in case of fraud it does not enlarge the scope of his power, as he could do this without a statutory enactment.[2]

The Act of 1841 did not contain any provision like that of paragraph *c*.[3] Under the Act of 1867 all attachments on mesne process were dissolved if laid within four months of the commencement of bankruptcy proceedings,[4] and it was held that a lien acquired by virtue of a distress warrant was included in mesne attachments.[5] The present law has a wider scope.

[1] *Supra*, § 296.
[2] Ib.
[3] Peck *v.* Jenness, 7 How. 612; *supra*, § 332.
[4] § 14, 14 Stats. 522, R. S. 5044; *supra*, § 334.
[5] Morgan *v.* Campbell, 22 Wall. 381.

The lien is dissolved in these cases: if it was obtained while the defendant was insolvent and its enforcement will work a preference, or if the parties had reasonable cause to know that the defendant was insolvent and in contemplation of bankruptcy, or if it was obtained in fraud of the act.[1]

Clause 1 relates only to liens acquired by a creditor, and it is not necessary to show that either of the parties knew of the defendant's insolvency. If the effect of the lien will be to give the creditor a larger share of his debt than others, it will work a preference,[2] and if the debtor was insolvent at the time the lien will be dissolved. The characteristics of a transfer voidable by the trustee are different. The trustee must in that case show that the creditor had reasonable cause to believe that a preference was intended.[3]

Clause 2 includes liens got by all persons, whether creditors or not. The person benefited must have reasonable cause to believe the defendant was insolvent and contemplating bankruptcy. The phrase "in contemplation of bankruptcy" means more than in contemplation of being unable to pay one's debts. It means an intention by the debtor to file a voluntary petition, or a fear of an involuntary petition being filed against him.[4] Any evidence which will tend to show the debtor's insolvency will, if it is known to the creditor, tend to show that he had reasonable cause to believe that the debtor was insolvent.[5]

Under clause 3 the debtor and creditor must both intend a disposition of property by the lien which will cause the act to be defeated in some way. It was decided under a similar provision of the 35th section of the Act of 1867[6] that any dealing with property which will prevent its being distributed equally was a fraud on the act.[7] These cases show that the words "in fraud of the act" do not intend an act which would be a fraud at common law, but anything which prevents the bankrupt law from operating to its fullest extent.

[1] Act of 1898, § 67 c (1), (2), (3).
[2] Ib. § 60 b; *supra*, § 523.
[3] *Supra*, § 523.
[4] Buckingham *v.* McLean, 13 How. 151; *supra*, § 69.
[5] *Supra*, § 99.
[6] 14 Stats. 534, R. S. § 5128.
[7] Toof *v.* Martin, 13 Wall. 40; Buchanan *v.* Smith, 16 Wall. 277.

On the dissolution of the lien by reason of its being within the terms of paragraph *c*, the trustee will be subrogated to the title of the lien holder and will distribute the property affected by such liens, as required by the provisions of the bankrupt act.[1]

Paragraph *d* does not deal with liens acquired by virtue of legal proceedings, but only with liens given by the debtor of his own free will. Such liens are good however soon before bankruptcy they are given, provided they are *bona fide* and founded on a present consideration. If they require a record and are not recorded they will however be invalid.

Paragraph *e* contains substantially the same provisions as § 35 of the Act of 1867,[2] but the time limit there was six months instead of four. *Bona fide* purchasers were not expressly mentioned, but it was held that their rights were protected.[3] It is not necessary that the debtor should have been insolvent to avoid such a transfer.

There is nothing in this paragraph which would extend the time for setting aside the transaction to four months after the recording of the transfer. It is true that a petition can be filed within four months after the recording[4] though the transfer itself be long before, but there is no such provision in this section.[5] The odd result of this difference in the different sections of the act is that a person may be made a bankrupt on account of a fraudulent transfer which the trustee, when he is appointed, will not be able to set aside.[6]

A conveyance or transfer which is void under the laws of the state of the debtor's residence will be void against the trustee if it was made while the debtor was insolvent. This will include any conveyance which would be void at common law[7] or by statute.[8]

As to what conveyances are void independently of a bank-

[1] *Supra*, § 346.
[2] 14 Stats. 534, R. S. § 5129.
[3] Tiffany *v.* Lucas, 15 Wall. 410.
[4] *Supra*, § 466.
[5] See also § 523.
[6] See *supra*, § 523.
[7] Means *v.* Dowd, 128 U. S. 273. See *supra*, § 316.
[8] Bank of Leavenworth *v.* Hunt, 11 Wall. 391; Allen *v.* Massey, 17 Wall. 351.

rupt act see: Bigelow, Fraud, Vol. II.; Bump, Fraudulent Conveyances, 4th ed.; Burrill, Assignments, 6th ed.; Hunt, Fraudulent Conveyances, 2nd ed.; May, Fraudulent and Voluntary Dispositions of Property, 2nd ed.; Wait, Fraudulent Conveyances, 3rd ed. See also Twyne's Case, 1 Smith L. C. and notes.

Paragraph *f* applies only to liens which are acquired by the completion of legal proceedings and as a result of the determination of the controversy. It is evident from its terms, as well as by a comparison of paragraph *e*, that paragraph *f* does not apply to attachments on mesne process. Another distinction between this paragraph and paragraph *e* is, that the lien is void if acquired within four months of the filing of a petition, though the suit were begun long before, while under paragraph *e* the proceedings must have been begun within four months.[1] Paragraph *f* applies only to involuntary proceedings.[2] The decisions to the contrary overlook the phraseology of the paragraph.

The Act of 1800 dissolved all attachments,[3] but under the Act of 1867 only attachments on mesne process were affected by bankruptcy proceedings,[4] and such is usually the case under insolvent laws of the different states.[5] Paragraph *f* enacts that liens obtained by legal proceedings within four months of the petition in bankruptcy shall be void except in case of *bona fide* purchasers for value without notice. This paragraph means that a *bona fide* purchaser of a claim of the debtor may acquire a valid lien by legal proceedings, but any one with notice or reasonable cause for inquiry cannot get a valid lien. If the creditor have no notice when he brings his suit, but finds out the state of affairs before a judgment or levy, his lien will not be valid.[6] A curious result

[1] Re Brown, 91 Fed. Rep. 358. See Re De Lue, 91 Fed. Rep. 510; Re Easley, 1 N. B. N. 230; Re Friedman, 1 N. B. N. 208.

[2] Re De Lue, 91 Fed. Rep. 510; Re Easley, 1 N. B. N. 230. *Contra* Peck Lumber Co. *v.* Mitchell, 1 N. B. N. 262.

[3] Harrison *v.* Sterry, 5 Cranch, 289.

[4] Marshall *v.* Knox, 16 Wall. 551.

[5] Pub. Stats. (Mass.) c. 157, § 46; Hefner *v.* Herron, 117 Cal. 473; Hurlbutt *v.* Currier, 38 Atl. Rep. 502 (N. H.).

[6] Re Brown, 91 Fed. Rep. 358.

would be reached in case an attachment on mesne process was made more than four months before a petition in bankruptcy was filed against a debtor, and the attaching creditor wished to prosecute the suit after the petition was filed. His attachment would be valid under the provisions of paragraph *c*, but if he proceeded to judgment and levied execution, the lien would be void. If the suit were on a claim which was not released by the discharge, it would be for the creditor's interest to keep his attachment good. This he could do only by delaying until the bankruptcy proceedings were closed and then getting judgment.

It has been held that a lien given by statute when an execution is placed in the hands of a sheriff, though no levy be made, is included within paragraph *f*.[1]

The trustee or bankrupt or any creditor who has proved his debt may petition to redeem the property from a lien of any kind.[2]

§ 531. **Act of 1898.** — SEC. 68. SET-OFFS AND COUNTERCLAIMS. — *a*. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

b. A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

[1] Re Hopkins, 1 N. B. N. 20.

[2] Rule XXVIII. Form 43. See also § 533.

This section is like § 5073 of the Revised Statutes, which was taken from § 20 of the Act of 1867[1] with a slight addition. The words "estate of a bankrupt" are new in this act, the old law relating to mutual debts and credits "between the parties." It is evident, however, from a consideration of paragraph *b*, that this expression will have the same scope. The limit of time in paragraph *b* is different, and the qualification of knowledge of insolvency or that an act of bankruptcy had been committed is added. There was a conflict of authority whether a set-off would be allowed if bought after notice of insolvency.[2] This question is now settled by the statute in this section.

The words "with a view to such use," taken in connection with the rest of the section, evidently mean with a view to use as a set-off against the debtor himself and not in bankruptcy proceedings. Otherwise the last provision of the section as to knowledge of bankruptcy would be superfluous, because a man could not purchase a set-off intending to use it in bankruptcy proceedings unless he knew the debtor was bankrupt or likely to become so.

A creditor who has been preferred and afterward gives credit to a bankrupt for property which the bankrupt uses in his business is entitled to set off the latter amount in a suit by the trustee to recover the preference.[3]

For the general rules of the law of set-off see *supra*, §§ 251 *et seq.*

§ 532. **Act of 1898.** — SEC. 69. POSSESSION OF PROPERTY. — *a.* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the

[1] 14 Stats. 526.
[2] *Supra*, § 285.
[3] Act of 1898, § 60 c.; *supra*, § 523.

marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained: Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

Section 69 gives the court no power to take possession of the estate if the debtor is wasting the estate, but merely if he is neglecting it.[1] Forms are prescribed for the bonds mentioned in this section.[2]

The court has no authority under this section to take the property of third persons alleged to have been wrongfully conveyed to them by the bankrupt.[3] In a proper case the third person might be enjoined from disposing of the property.[4]

The proper procedure under § 69 is by way of petition to the court.[5] A prayer for a warrant under this section should not be introduced into an involuntary petition in bankruptcy.[6] The affidavit should be full and explicit.[7]

§ 533. **Act of 1898.** — SEC. 70. TITLE TO PROPERTY. — *a.* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or suc-

[1] See Form No. 8.
[2] Forms 8 & 9.
[3] Re Briggs, 3 N. B. R. 638, Fed. Cas. No. 1869; Re Harthill, 4 N. B. R. 392, Fed. Cas. No. 6161; Re Holland, 12 N. B. R. 403, Fed Cas. No. 6605; Mollison *v.* Eaton, 16 Minn. 426; Marsh *v.* Armstrong, 20 Minn. 81; Re Rockwood, 91 Fed. Rep. 363, 1 N. B. N. 134; Re Kelly, 91 Fed. Rep. 504.
[4] *Shiras, J.*, in the case last cited.
[5] Re Kelly, 91 Fed. Rep. 504.
[6] Ib.
[7] Ib.

cessors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

b. All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the ap-

proval of the court for less than seventy-five per centum of its appraised value.

c. The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

d. Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

e. The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value.

f. Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him.

The title of the trustee usually dates from an earlier time than that prescribed by this section. In England the title relates back for a considerable time.[1] Under the Act of 1867 the commencement of proceedings was the limit.[2] Section 3 of the Act of 1841[3] vested the bankrupt's property in the trustee as of the date of the decree adjudging the debtor a bankrupt. The limit is the same now.

It was held in several cases under the Act of 1841 that the

[1] *Supra*, § 297.
[2] § 14, 14 Stats. 522, R. S. § 5044.
[3] 5 Stats. 442.

property of the debtor at the time of filing the petition went to the trustee,[1] though there were many decisions to the contrary.[2] Whatever may have been the proper rule under that act, it is clear that it was the intention of Congress that the trustee's title should at present not relate farther back than the adjudication. The difference in phraseology between the Act of 1898 and that of 1867 seems conclusive on this point.

If there be an appeal on the question of adjudication, the trustee's title will date from the time that the case was decided on appeal.[3] In such a case the rights of innocent third parties taking under the bankrupt may have accrued. This will interfere with the trustee in his administration of the estate.[4]

There is no doubt that the trustee is vested with the title of the bankrupt as of the date of the adjudication. The documents of property owned at this time, the interests in patents, copyrights and trade-marks and the powers possessed by the bankrupt at this time pass to the trustee.[5] Clause 5 seems inconsistent with the rest of paragraph *a* in establishing the time of filing the petition as the date at which the property passes. But this clause should be construed as a description of what property passes rather than as establishing the date of passage, since that date is fixed by the first part of the paragraph. This is the only way of construing the whole paragraph consistently. Each of the clauses 1 to 6 comprises a different kind of property or interest in property. Clause 5 is intended also as a description of a certain kind of property and does not qualify the time of vesting. The form of paragraph *a* shows that this is the proper construction. To hold otherwise would effect a repeal of one of the chief provisions of § 70 by the terms of a subdivision of that section.

[1] Ex parte Foster, 2 Story, 131, Fed. Cas. No. 4960; Ex parte Newhall, 2 Story, 360, Fed. Cas. 10,159; Ex parte Waddell, 1 N. Y. Leg. Obs. 53, Fed. Cas. No. 17,027; Re Rust, 1 N. Y. Leg. Obs. 326, Fed. Cas. 12,171.

[2] Downer *v.* Brackett, 5 Law Rep. 392, Fed. Cas. No. 4043; Anon. 1 Pa. L. J. Rep. 121, Fed. Cas. No. 467; Miller *v.* Black, 1 Pa. St. 420; Berthelon *v.* Betts, 4 Hill, 577, and cases cited in Bump, Bankruptcy, 10th ed. 487, 11th ed. 336.

[3] Act of 1898, § 1 (2); *supra*, § 464.

[4] See *supra*, § 297.

[5] Act of 1898, § 70 a (1), (2), (3).

A learned author[1] suggests that the trustee's title relates to the adjudication, but that only property which the bankrupt had owned at the time of the petition will pass. This suggestion does not seem consistent with the first part of paragraph *a*, by the terms of which all documents relating to property, all patents, copyrights and trade-marks and all powers which the bankrupt owned at the time of the adjudication pass to the trustee, no matter when they were acquired.

The trustee is vested by § 70 with "the title of the bankrupt." This must not be understood to mean that he gets merely the rights of the bankrupt. In that case he would have no right to the property transferred in fraud of creditors and the provisions of clause 4 would be nugatory.

This section resembles the Act of 1841 in not requiring an assignment to vest the bankrupt's property in the trustee.[2] The Act of 1867 prescribed an assignment.[3]

Property which is exempt does not pass to the trustee and it makes no difference that the debtor has waived his exemption.[4]

The rule prescribed by clause 2 has been usual in bankrupt laws. See §§ 318 *et seq.*

Clause 3 has changed the former law. Such a power is not property and was held not to pass to the trustee.[5] Several statutes have included these powers.[6]

Clause 4 contains a provision common in bankrupt laws. The trustee representing the creditors would have this right without any statutory enactment.[7] It has been held that this clause applies also to transfers which are not fraudulent in the ordinary sense but which tend to defeat or delay the act.[8]

Clause 5 resembles a provision of the insolvent law of Massachusetts which is now contained in § 46 of chapter 157

[1] See Collier, Bankruptcy, 404 *et seq.*

[2] Oakey *v.* Bennett, 11 How. 33, 45; Commercial Bank *v.* Buckner, 20 How. 108.

[3] § 14, 14 Stats. 522, R. S. § 5044.

[4] Re Camp, 91 Fed. Rep. 745, 1 N. B. N. 142. See *supra*, § 469.

[5] *Supra*, § 330.

[6] Ib.

[7] *Supra*, § 315.

[8] Re Gutwillig, 90 Fed. Rep. 475. See Davis *v.* Bohle, 92 Fed. Rep. 325, 1 N. B. N. 216.

of the Public Statutes of Massachusetts. "The assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned or conveyed, or which might have been taken on execution upon a judgment against him." [1] There was no such provision as this in the Act of 1867.[2]

The trustee will get some rights under this clause which he did not have under the Act of 1867. Thus he will have a better title than a purchaser from the bankrupt holding under an unrecorded chattel mortgage,[3] because such chattels can be taken on execution,[4] while under the Act of 1867 the trustee took only the debtor's title.[5] And the trustee will take real estate which had been attached by a creditor of the bankrupt and sold subject to the incumbrance.[6]

In Massachusetts, property held in trust by the debtor does not pass to the assignee because it is not "property of the debtor." [7] This is the only just rule and has been the law under all bankrupt acts.[8] The courts of Massachusetts refused to extend the decision in Bingham *v.* Jordan[9] to the case of an unrecorded deed of land, on the ground that in this case also the land was no longer the property of the debtor.[10] It may be noted here that in Massachusetts a purchaser from a debtor after a petition has been filed gets no title as against the assignee.[11] This case, however, is not strictly an authority, because under the Massachusetts insolvent law the assignee's title relates to the first publication of the warrant.[12] If the person taking from a bankrupt after the adjudication knew of the bankruptcy, the transfer might be set aside on the ground of a preference.[13]

[1] Pub. Stats. c. 157 § 46.

[2] Ex parte Dalby, 1 Lowell, 431, Fed. Cas. No. 3540; Dugan *v.* Nichols, 125 Mass. 43, 45.

[3] Bingham *v.* Jordan, 1 Allen, 373.

[4] See cases cited in Bingham *v.* Jordan, *supra*.

[5] Ex parte Dalby, 1 Lowell, 431, Fed. Cas. No. 3540; *supra*, § 309.

[6] Ex parte Ames, 1 Lowell, 561, 568, Fed. Cas. No. 323. See *supra*, § 337.

[7] Audenried *v.* Betteley, 5 Allen, 382; Holmes *v.* Winchester, 133 Mass. 140; Low *v.* Welch, 139 Mass. 33.

[8] *Supra*, § 311.

[9] 1 Allen, 373.

[10] Smythe *v.* Sprague, 149 Mass. 310. See *supra*, § 309.

[11] Palmer *v.* Jordan, 163 Mass. 350.

[12] Pub. Stats. c. 157, § 46.

[13] Ex parte Palmer, 10 Morrell, 252.

If a bankrupt has an insurance policy payable to himself, it will pass to his trustee unless he pays the surrender value of it. And this will be the case even in a state where such policies are exempt, since the bankrupt law is paramount and its provisions on this point are explicit.[1] But a policy of insurance payable to the wife or children of the insured does not come within the terms of the act.[2] The purpose of the enactment was to prevent a fraudulent disposition of money to defeat creditors.[3]

By clause 6 a cause of action in tort is assignable if property rights are involved. This has been the usual rule.[4] A personal action, such as an action of slander or libel or an action for personal injuries, does not pass to the trustee.[5] Nor does an action for malicious prosecution and false imprisonment.[6] Whether an action for slander of title would pass might be doubtful, but as a right to property is involved, the trustee ought to be allowed to prosecute it.

Paragraph *b* provides for the appointment of appraisers to value the estate of a bankrupt. The form of oath to be taken by them and of their report is prescribed by Form 13.

Creditors are by § 58 entitled to ten days' notice of all sales unless they waive notice in writing. An exception is made by Rule XVIII., which provides that perishable estate, on which there will be a loss if it be not sold at once, may, on petition of a bankrupt, creditor, receiver or trustee, be ordered to be sold without notice. At first sight this rule seems inconsistent with the Act of 1898. But it may be said that a court of bankruptcy would have power under the wide provisions of § 2 to order such a sale if it were clearly for the interest of the estate. If this is true, the rule is valid. Judge John Lowell held that the court might dispense with notice of a sale by auction although § 4 of the act of June 22, 1874, required it,[7] because the court by other parts of the

[1] Re Lange, 91 Fed. Rep. 861, 1 N. B. N. 60.
[2] *Shiras, J.*, in the case last cited.
[3] Ib.
[4] *Supra*, § 303.
[5] *Supra*, § 325.
[6] Re Haensell, 91 Fed. Rep. 355.
[7] Re Bailey, District Court for Mass April, 1875; not reported.

bankrupt act was given power over arrangements for the sale of property.

It is often for the advantage of the estate that property should be sold at once without waiting for notice to be given. It has been held that the good-will of a business may be sold as being perishable and subject to loss in value.[1] This agrees with a New Jersey case, where the court ordered the sale of the road-bed of a railroad without waiting for the termination of a litigation.[2] The statute gave power to do this to prevent deterioration in value. Form 46 prescribes the allegations in a petition for sale of perishable property.

There are statutes in many states allowing attached property to be sold if it is perishable. These statutes apply usually only to articles which are likely to decay.[3] But some of them allow a sale if there is risk of loss in value. Under such statutes it has been held that fancy goods are perishable,[4] and horses and carriages also.[5] Where the phrase "perishable property" is used in a bill of lading or policy of insurance, it has the more restricted meaning.[6]

The trustee must sell property at public auction unless otherwise ordered.[7] He should petition the referee for authority to sell real estate at auction.[8] After ten days' notice to creditors and a hearing, the referee may order the sale. The trustee must keep an account of each parcel sold with the price and the name of the buyer; the account is to be filed with the referee.[9]

There is no provision for a petition for leave to sell personalty, but the trustee cannot sell such property without leave

[1] Re Great Round World Pub. Co., 1 N. B. N. 130.

[2] Middleton *v.* N. J. R. R., 26 N. J. Eq. 269.

[3] Webster *v.* Peck, 31 Conn. 495; Henisler *v.* Friedman, 5 Pa. L. J. Rep. 147; Fisk *v.* Spring, 25 Hun, 367; 1 Shinn, Attachment, § 262.

[4] Crocker *v.* Baker, 18 Pick. 407; Schumann *v.* Davis, 26 Abb. N. C. 125.

[5] Jackson *v.* Colcord, 114 Mass. 60; Jackson *v.* Kimball, 121 Mass. 204; Millard *v.* Hall, 24 Ala. 209. See Steele *v.* Wyatt, 23 Ala. 764; Dugans *v.* Livingston, 15 Mo. 230.

[6] Robinson *v.* Comm. Ins. Co., 3 Sumn. 220, Fed. Cas. No. 11,949; Astor *v.* Union Ins. Co., 7 Cow. 202; Williams *v.* Bangor Ins. Co., 16 Maine, 207; Illinois Central R. R. *v.* McClellan, 54 Ill. 58.

[7] Rule XVIII. 1.

[8] Form 42.

[9] Ib.

of the referee for less than seventy-five per cent of its appraised value.[1] The proper practice would, therefore, seem to be to petition the referee for leave to sell personal property at auction. Notice should be given to creditors and the other details arranged in the same way as in a sale of real estate.

A trustee may be authorized to sell any part of the bankrupt's estate at private sale.[2] The terms of the rule which allows this seem to refer only to personal estate, but as there is no prohibition of a private sale of real estate, the same principles would apply to a sale of land. In the petition for private sale the trustee should set forth his reasons for thinking it advantageous. Notice must be given and an account kept by the trustee as in other sales.[3] Rule XVIII. and Form 45 apply only to the sale of a specified portion of the estate, but if a case should ever arise where the whole estate might be sold privately, the court would have power to order it. No harm could come from such an order, because all creditors have notice and may object if they desire. Such an order would not be made against the wishes of a majority of creditors.

If the trustee wishes to redeem any part of the estate from an incumbrance he may petition therefor, and after notice to creditors the court may order the trustee to discharge the property from the lien.[4] The petition should describe the property and its value and state the nature of the lien.[5]

The trustee may also on proper petition after notice be ordered to sell property subject to incumbrances,[6] or it may be sold free from incumbrances.[7]

After-acquired property does not vest in the trustee.[8]

The provision of paragraph *e* is merely declaratory of the

[1] Act of 1898, § 70 b.

[2] Rule XVIII. 2.

[3] Form 45.

[4] Rule XXVIII., Form 43.

[5] Form 43. It may be noted here that although the Form is drawn to cover only the petition of a trustee, a creditor or the bankrupt himself may file a petition for redemption. See Rule XXVIII.

[6] Form 44.

[7] Re Pittelkow, 92 Fed. Rep. 901, 1 N. B. N. 234; Re Worland, 92 Fed. Rep. 893.

[8] See Re Smith, 1 N. B. N. 136. See *ante*, § 366.

law and has not changed it or added any new power. The trustee could always set aside transactions which any creditor could avoid.[1]

§ 534. **Effect of Bankrupt Act on Proceedings under State Laws.** —*a.* This act shall go into full force and effect upon its passage: *Provided, however*, That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

b. Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it.

Approved July 1, 1898.

State insolvent laws were suspended on the day the act went into effect, because the proviso that all proceedings begun under such laws before that time should be valid denied by implication the validity of proceedings begun afterward.[2] And so was an assignment law whose scope was so broad as to be practically an insolvent law.[3] But a law allowing the appointment of a receiver of an insolvent corporation is not suspended,[4] nor is a law allowing proceedings for appointing a receiver supplementary to execution.[5] The phraseology of former bankrupt acts was different in this respect and the decisions on the point were that state laws were not suspended till proceedings in bankruptcy could be begun.[6]

[1] *Supra*, § 296.

[2] Parmenter Mfg. Co. *v.* Hamilton, 172 Mass. 178; Blake *v.* Francis, 89 Fed. Rep. 691; Re Gutwillig, 90 Fed. Rep. 475; Re Bruss-Ritter Co., 90 Fed. Rep. 651; Re Smith, 92 Fed. Rep. 135; Re Etheridge Furniture Co., 92 Fed. Rep. 329, 1 N. B. N. 139; Re McKee, 1 N. B. N. 139. Devlin *v.* Helliwell, 1 N. B. N. 41, *contra*.

[3] Re Curtis, 91 Fed. Rep. 737; Re Smith, 92 Fed. Rep. 135.

[4] State *v.* Superior Court, 56 Pac. Rep. 35 (Wash.).

[5] Re Meyers, 1 N. B. N. 293.

[6] *Supra*, § 13.

An act of bankruptcy committed before the time when a petition may be filed against a debtor may be taken advantage of by creditors when the time for filing the petition arrives.[1] If a debtor has committed an act of bankruptcy by suffering judgment in a state court before November 1, 1898, the district court will enjoin a sale of his property under power of the state court until the creditors can file a petition;[2] but the state court itself will not stop such a sale unless enjoined.[3]

Proceedings begun under state laws before the passage of the act are not affected by it. These cases may be wound up in the state courts precisely as if the act had not been passed.[4]

[1] Trader's Bank *v.* Campbell, 14 Wall. 87; Re Bruss-Ritter Co., 90 Fed. Rep. 651.

[2] Blake *v.* Francis, 89 Fed. Rep. 691.

[3] Vietor *v.* Lewis, 24 Misc. Rep. 515.

[4] Sneider *v.* Simon, 1 N. B. N. 12.

APPENDIX I.

BANKRUPTCY ACTS.

ACT OF 1800.

Act of April 4, 1800, c. 19, 2 Stats. 19. — *An Act to establish an uniform System of Bankruptcy throughout the United States.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the first day of June next, if any merchant, or other person, residing within the United States, actually using the trade of merchandise, by buying and selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter, or marine insurer, shall, with intent unlawfully to delay or defraud his or her creditors, depart from the state in which such person usually resides, or remain absent therefrom, or conceal him or herself therein, or keep his or her house, so that he or she cannot be taken, or served with process, or willingly or fraudulently procure him or herself to be arrested, or his or her lands, goods, money or chattels to be attached, sequestered, or taken in execution, or shall secretly convey his or her goods out of his or her house, or conceal them to prevent their being taken in execution, or make, or cause to be made, any fraudulent conveyance of his or her lands, or chattels, or make or admit any false or fraudulent security, or evidence of debt, or being arrested for debt, or having surrendered him or herself in discharge of bail, shall remain in prison two months, or more, or escape therefrom, or whose lands or effects being attached by process issuing out of, or returnable to, any court of common law, shall not, within two months after written notice thereof, enter special bail and dissolve the same, or in districts in which attachments are not dissolved by the entry of special bail, being arrested for debt after his or her lands and effects, or any part thereof, have been attached for a debt or debts amounting to one thousand dollars or upwards, shall not, upon notice of such attachment, give sufficient security for the payment of what may be recovered in the suit

in which he or she shall be arrested, at or before the return day of the same, to be approved by the judge of the district, or some judge of the court out of which the process issued upon which he is arrested, or to which the same shall be returnable, every such person shall be deemed and adjudged a bankrupt: *Provided*, that no person shall be liable to a commission of bankruptcy, if the petition be not preferred, in manner hereinafter directed, within six months after the act of bankruptcy committed.

SEC. 2. *And be it further enacted*, That the judge of the district court of the United States, for the district where the debtor resides, or usually resided at the time of committing the act of bankruptcy, upon petition, in writing, against such person or persons being bankrupt, to him to be exhibited by any one creditor, or by a greater number, being partners, whose single debt shall amount to one thousand dollars, or by two creditors, whose debts shall amount to one thousand five hundred dollars, or by more than two creditors, whose debts shall amount to two thousand dollars, shall have power, by commission under his hand and seal, to appoint such good and substantial persons, being citizens of the United States, and resident in such district, as such judge shall deem proper, not exceeding three, to be commissioners of the said bankrupt, and in case of vacancy or refusal to act, to appoint others from time to time, as occasion may require: *Provided always*, that before any commission shall issue, the creditor or creditors petitioning shall make affidavit or solemn affirmation before the said judge, of the truth of his, her or their debts, and give bond, to be taken by the said judge, in the name, and for the benefit of the said party so charged as a bankrupt, and in such penalty, and with such surety as he shall require, to be conditioned for the proving of his, her or their debts, as well before the commissioners as upon a trial at law, in case the due issuing forth of the said commission shall be contested, and also for proving the party a bankrupt, and to proceed on such commission, in the manner herein prescribed. And if such debt shall not be really due, or after such commission taken out it cannot be proved that the party was a bankrupt, then the said judge shall, upon the petition of the party aggrieved, in case there be occasion, deliver such bond to the said party, who may sue thereon, and recover such damages, under the penalty of the same, as, upon trial at law, he shall make appear he has sustained, by reason of any breach of the condition thereof.

SEC. 3. *And be it further enacted*, That before the commissioners shall be capable of acting, they shall respectively take and

subscribe the following oath or affirmation, which shall be administered by the judge issuing the commission, or by any of the judges of the supreme court of the United States, or any judge, justice, or chancellor of any state court, and filed in the office of the clerk of the district court: "I, A.B., do swear, or affirm, that I will faithfully, impartially, and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me, as a commissioner in a commission of bankruptcy against

and that without favor or affection, prejudice or malice." And the commissioners, who shall be sworn as aforesaid, shall proceed, as soon as may be, to execute the same; and upon due examination, and sufficient cause appearing against the party charged, shall and may declare him or her to be a bankrupt: *Provided*, that before such examination be had, reasonable notice thereof, in writing, shall be delivered to the person charged as a bankrupt; or if he, or she, be not found at his or her usual place of abode, to some person of the family above the age of twelve years, or if no such person appear, shall be fixed at the front or other public door of the house, in which he or she usually resides, and thereupon it shall be in the power of such person, so charged as aforesaid, to demand before, or at the time appointed for such examination, that a jury be empanneled to inquire into the fact or facts, alleged, as the causes for issuing the commission, and on such demand being made, the inquiry shall be had before the judge granting the commission, at such time as he may direct, and in that case, such person shall not be declared bankrupt, unless, by the verdict of the jury, he or she shall be found to be within the description of this act, and shall be convicted of some one of the acts described in the first section of this act: *Provided also*, that any commission which shall be taken out as aforesaid, and which shall not be proceeded in as aforesaid, within thirty days thereafter, may be superseded by the said judge, who shall have granted the same, upon the application of the party thereby charged as a bankrupt, or of any creditor of such person, unless the delay shall have been unavoidable, or upon a just occasion.

SEC. 4. *And be it further enacted*, That the commissioners so to be appointed, shall have power forthwith, after they have declared such person a bankrupt, to cause to be apprehended, by warrant under their hands and seals, the body of such bankrupt, wheresoever to be found, within the United States: *Provided*, they shall think, that there is reason to apprehend that the said bankrupt intends to abscond or conceal him or herself, and in case it be nec-

essary, in order to take the body of the said bankrupt, shall have power to cause the doors of the dwelling-house of such bankrupt to be broken, or the doors of any other house in which he or she shall be found.

SEC. 5. *And be it further enacted*, That it shall be the duty of the commissioners so to be appointed, forthwith, after they have declared such person a bankrupt, and they shall have power to take into their possession, all the estate, real and personal, of every nature and description to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever, and cause the same to be inventoried and appraised to the best value, (his or her necessary wearing apparel, and the necessary wearing apparel of the wife and children, and necessary beds and bedding of such bankrupt only excepted), and also to take into their possession, and secure, all deeds and books of account, papers and writings belonging to such bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen or appointed, in manner hereafter provided.

SEC. 6. *And be it further enacted*, That the said commissioners shall forthwith, after they have declared such person a bankrupt, cause due and sufficient public notice thereof to be given, and in such notice shall appoint some convenient time and place for the creditors to meet, in order to choose an assignee or assignees of the said bankrupt's estate and effects; — at which meeting the said commissioners shall admit the creditors of such bankrupt to prove their debts; — and where any creditor shall reside at a distance from the place of such meeting, shall allow the debt of such creditor to be proved by oath or affirmation, made before some competent authority, and duly certified, and shall permit any person duly authorized by letter of attorney from such creditor, due proof of the execution of such letter of attorney being first made, to vote in the choice of an assignee or assignees of such bankrupt's estate and effects, in the place and stead of such creditor: and the said commissioners shall assign, transfer or deliver over, all and singular the said bankrupt's estate and effects, aforesaid, with all muniments and evidences thereof, to such person or persons as the major part, in value, of such creditors, according to the several debts then proved, shall choose as aforesaid: *Provided always*, that in such choice, no vote shall be given by, or in behalf of any creditor whose debt shall not amount to two hundred dollars.

SEC. 7. *Provided always, and be it further enacted*, That it shall be lawful for the said commissioners, as often as they shall see cause, for the better preserving and securing the bankrupt's estate,

before assignees shall be chosen as aforesaid, immediately to appoint one or more assignee or assignees of the estate and effects aforesaid, or any part thereof; which assignee or assignees aforesaid, or any of them, may be removed at the meeting of the creditors, so to be appointed as aforesaid, for the choice of assignees, if such creditors, entitled to vote as aforesaid, or the major part, in value, of them, shall think fit; and such assignee or assignees as shall be so removed, shall deliver up all the estate and effects of such bankrupt, which shall have come to his or their hands or possession, unto such other assignee or assignees as shall be chosen by the creditors as aforesaid; and all such estate and effects shall be, to all intents and purposes, as effectually and legally vested in such new assignee or assignees, as if the first assignment had been made to him or them, by the said commissioners; and if such first assignee or assignees shall refuse or neglect, for the space of ten days next after notice, in writing, from such new assignee or assignees of their appointment, as aforesaid, to deliver over as aforesaid, all the estate and effects as aforesaid, every such assignee or assignees shall, respectively, forfeit a sum not exceeding five thousand dollars, for the use of the creditors, and shall moreover be liable for the property so detained.

SEC. 8. *And be it further enacted*, That at any time, previous to the closing of the accounts of the said assignee or assignees so chosen as aforesaid, it shall be lawful for such creditors of the bankrupt, as are hereby authorized to vote in the choice of assignees, or the major part of them, in value, at a regular meeting of the said creditors, to be called for that purpose, by the said commissioners, or by one fourth, in value, of such creditors, to remove all or any of the assignees chosen as aforesaid, and to choose one or more in his or their place and stead: and such assignee or assignees as shall be so removed, shall deliver up all the estate and effects of such bankrupt, which shall have come into his or their hands or possession, unto such new assignee or assignees as shall be chosen by the creditors, at such meeting; and all such estate and effects shall be, to all intents and purposes, as effectually and legally vested in such new assignee or assignees, as if the first assignment had been made to him or them, by the said commissioners: and if such former assignee or assignees shall refuse or neglect, for the space of ten days next after notice, in writing, from such new assignee or assignees, of their appointment, as aforesaid, to deliver over, as aforesaid, all the estate and effects aforesaid, every such former assignee or assignees, shall, respectively, forfeit a sum not exceed-

ing five thousand dollars, for the use of the creditors, and shall moreover be liable for the property so detained.

SEC. 9. *And be it further enacted*, That whenever a new assignee or assignees shall be chosen as aforesaid, no suit at law or in equity shall be thereby abated; but it shall and may be lawful for the court in which any suit may depend, upon the suggestion of a removal of a former assignee or assignees, and of the appointment of a new assignee or assignees, to allow the name of such new assignee or assignees, to be substituted in place of the name or names of the former assignee or assignees, and thereupon the suit shall be prosecuted in the name or names of the new assignee or assignees, in the same manner as if he or they had originally commenced the suit in his or their own names.

SEC. 10. *And be it further enacted*, That the assignment or assignments of the commissioners of the bankrupt's estate and effects as aforesaid, made as aforesaid, shall be good at law or in equity, against the bankrupt; and all persons claiming by, from, or under such bankrupt, by any act done at the time, or after he shall have committed the act of bankruptcy, upon which the commission issued: *Provided always*, that in case of a *bona fide* purchase made before the issuing of the commission from or under such bankrupt, for a valuable consideration, by any person having no knowledge, information, or notice of any act of bankruptcy committed, such purchase shall not be invalidated or impeached.

SEC. 11. *And be it further enacted*, That the said commissioners shall have power, by deed or deeds, under their hands and seals, to assign and convey to the assignee or assignees, to be appointed or chosen as aforesaid, any lands, tenements, or hereditaments, which such bankrupt shall be seised of, or entitled to, in fee tail, at law, or in equity, in possession, remainder, or reversion, for the benefit of the creditors; and all such deeds, being duly executed and recorded according to the laws of the state within which such lands, tenements, or hereditaments may be situate, shall be good and effectual against all persons whom the said bankrupt, by common recovery, or other means, might or could bar of any estate, right, title, or possibility of or in the said lands, tenements, or hereditaments.

SEC. 12. *And be it further enacted*, That if any bankrupt shall have conveyed or assured any lands, goods or estate, unto any person, upon condition or power of redemption, by payment of money or otherwise, it shall be lawful for the commissioners, or for any person by them duly authorized for that purpose, by writing, under their hands and seals, to make tender of money or other performance

according to the nature of such condition, as fully as the bankrupt might have done; and the commissioners, after such performance or tender, shall have power to assign such lands, goods and estate, for the benefit of the creditors, as fully and effectually as any other part of the estate of such bankrupt.

SEC. 13. *And be it further enacted*, That the commissioners aforesaid shall have power to assign, for the use aforesaid, all the debts due to such bankrupt, or to any other person for his or her use or benefit; which assignment shall vest the property and right thereof in the assignee or assignees of such bankrupt, as fully as if the bond, judgment, contract, or claim, had originally belonged or been made to the said assignees; and after the said assignment, neither the said bankrupt, nor any person acting as trustee for him or her, shall have power to recover or discharge the same, nor shall the same be attached as the debt of the said bankrupt; but the assignee or assignees aforesaid shall have such remedy to recover the same, in his or their own name or names, as such bankrupt might or could have had, if no commission of bankruptcy had issued. And when any action in the name of such bankrupt shall have been commenced, and shall be pending for the recovery of any debt or effects of such bankrupt, which shall be assigned, or shall, or might become vested in the assignee or assignees of such bankrupt as aforesaid, then such assignee or assignees may claim to be, and shall be thereupon admitted to prosecute such action in his or their name, for the use and benefit of the creditors of such bankrupt; and the same judgment shall be rendered in such action, and all attachments or other security taken therein, shall be in like manner holden and liable, as if the said action had been originally commenced in the name of such assignee or assignees, after the original plaintiff therein had become a bankrupt as aforesaid: *Provided*, that where a debtor shall have, *bona fide*, paid his debt to any bankrupt, without notice that such person was bankrupt, he or she shall not be liable to pay the same to the assignee or assignees.

SEC. 14. *And be it further enacted*, That if complaint shall be made or information given to the commissioners, or if they shall have good reason to believe or suspect, that any of the property, goods, chattels, or debts, of the bankrupt, are in the possession of any other person, or that any person is indebted to, or for the use of the bankrupt, then the said commissioners shall have power to summon, or to cause to be summoned, by their attorney or other person duly authorized by them, all such persons before them, or the judge of the district where such person shall reside, by such

process, or other means, as they shall think convenient, and upon their appearance, to examine them by parole or by interrogatories, in writing, on oath, or affirmation, which oath or affirmation they are hereby empowered to administer, respecting the knowledge of all such property, goods, chattels, and debts; and if such person shall refuse to be sworn or affirmed, and to make answer to such questions or interrogatories as shall be administered, and to subscribe the said answers, or upon examination shall not declare the whole truth, touching the subject matter of such examination, then it shall be lawful for the commissioners, or judge, to commit such person to prison, there to be detained until they shall submit themselves to be examined in manner aforesaid, and they shall, moreover, forfeit double the value of all the property, goods, chattels, and debts, by them concealed.

SEC. 15. *And be it further enacted*, That if any of the aforesaid persons shall, after legal summons to appear before the commissioners or judge, to be examined, refuse to attend, or shall not attend at the time appointed, having no such impediment as shall be allowed of by the commissioners or judge, it shall be lawful for the said commissioners or judge to direct their warrants to such person or persons as by them shall be thought proper, to apprehend such person as shall refuse to appear, and to bring them before the commissioners or judge, to be examined, and upon their refusal to come, to commit them to prison, until they shall submit themselves to be examined, according to the directions of this act; *Provided*, that such witnesses as shall be so sent for, shall be allowed such compensation as the commissioners or judge shall think fit, to be rateably borne by the creditors; and if any person, other than the bankrupt, either by subornation of others, or by his or her own act, shall wilfully or corruptly commit perjury on such examination, to be taken before the commissioners as aforesaid, the party so offending, and all persons who shall procure any person to commit such perjury, shall, on conviction thereof, be fined, not exceeding four thousand dollars, and imprisoned, not exceeding two years, and moreover shall, in either case, be rendered incapable of being a witness in any court of record.

SEC. 16. *And be it further enacted*, That if any person or persons shall fraudulently, or collusively claim any debts, or claim or detain any real or personal estate of the bankrupt, every such person shall forfeit double the value thereof, to and for the use of the creditors.

SEC. 17. *And be it further enacted*, That if any person, prior to

his or her becoming a bankrupt, shall convey to any of his or her children, or other persons, any lands or goods, or transfer his or (her) debts or demands into other persons' names, with intent to defraud his or her creditors, the commissioners shall have power to assign the same, in as effectual a manner as if the bankrupt had been actually seised or possessed thereof.

SEC. 18. *And be it further enacted*, That if any person or persons who shall become bankrupt within the intent and meaning of this act, and against whom a commission of bankruptcy shall be duly issued, upon which commission such person or persons shall be declared bankrupt, shall not, within forty-two days after notice thereof, in writing, to be left at the usual place of abode of such person or persons, or personal notice in case such person or persons be then in prison, and notice given in some gazette, that such commission hath been issued, and of the time and place of meeting of the commissioners, surrender him or herself to the said commissioners, and sign or subscribe such surrender, and submit to be examined, from time to time, upon oath or solemn affirmation, by and before such commissioners, and in all things conform to the provisions of this act, and also upon such his or her examination, fully and truly disclose and discover all his or her effects and estate, real and personal, and how and in what manner, to whom and upon what consideration, and at what time or times he or she hath disposed of, assigned or transferred, any of his or her goods, wares, or merchandise, monies, or other effects and estate, and of all books, papers and writings relating thereunto, of which he or she was possessed, or in or to which he or she was any ways interested or entitled, or which any person or persons shall then have, or shall have had in trust for him or her, or for his or her use, at any time before or after the issuing of the said commission, or whereby such bankrupt, or his or her family then hath, or may have or expect any profit, possibility of profit, benefit or advantage whatsoever, except only such part of his or her estate and effects as shall have been really and *bona fide* before sold and disposed of, in the way of his or her trade and dealings, and except such sums of money as shall have been laid out in the ordinary expenses of his or her family, and also upon such examination, execute in due form of law, such conveyance, assurance, and assignment of his or her estate, whatsoever and wheresoever, as shall be devised and directed by the commissioners, to vest the same in the assignees, their heirs, executors, administrators, and assigns for ever, in trust, for the use of all and every the creditors of such bankrupt, who shall come in and prove

their debts under the commission; and deliver up unto the commissioners, all such part of his or her the said bankrupt's goods, wares, merchandise, money, effects and estate, and all books, papers, and writings relating thereunto, as at the time of such examination shall be in his or her possession, custody or power, his or her necessary wearing apparel, and the necessary wearing apparel of the wife and children, and necessary beds and bedding, of such bankrupt only excepted, then he or she the said bankrupt, upon the conviction of any wilful default, or omission in any of the matters or things aforesaid, shall be adjudged a fraudulent bankrupt, and shall suffer imprisonment for a term not less than twelve months, nor exceeding ten years, and shall not, at any time after, be entitled to the benefits of this act: *Provided always*, that in case any bankrupt shall be in prison or custody at the time of the issuing such commission, and is willing to surrender and submit to be examined, according to the directions of this act, and can be brought before the said commissioners and creditors for that purpose, the expense thereof shall be paid out of the said bankrupt's effects, and in case such bankrupt is in execution, or cannot be brought before the commissioners, that then the said commissioners, or some one of them shall, from time to time, attend the said bankrupt in prison or custody, and take his or her discovery as in other cases, and the assignees, or one of them, or some person appointed by them, shall attend such bankrupt in prison or custody, and produce his or her books, papers and writings, in order to enable him or her to prepare his or her discovery; a copy whereof the said assignees shall apply for, and the said bankrupt shall deliver to them or their order, within a reasonable time after the same shall have been required.

SEC. 19. *And be it further enacted*, That the said commissioners shall appoint, within the said forty-two days, so limited as aforesaid, for the bankrupt to surrender and conform as aforesaid, not less than three several meetings for the purposes aforesaid, the third of which meetings shall be on the last of the said forty-two days: *Provided always*, that the judge of the district within which such commission issues, shall have power to enlarge the time so limited as aforesaid, for the purposes aforesaid, as he shall think fit, not exceeding fifty days, to be computed from the end of the said forty-two days, so as such order for enlarging the time be made at least six days before the expiration of said term.

SEC. 20. *And be it further enacted*, That it shall be lawful for the commissioners, or any other person or officers, by them to be appointed, by their warrant, under their hands and seals, to break

open in the day time the houses, chambers, shops, warehouses, doors, trunks, or chests, of the bankrupt, where any of his or her goods or estate, deeds, books of account or writings, shall be, and to take possession of the goods, money, and other estate, deeds, books of account or writings of such bankrupt.

SEC. 21. *And be it further enacted*, That if the bankrupt shall refuse to be examined, or to answer fully, or to subscribe his or her examination as aforesaid, it shall be lawful for the commissioners to commit the offender to close imprisonment, until he or she shall conform him or herself; and if the said bankrupt shall submit to be examined, and upon his or her examination, it shall appear that he or she hath committed wilful or corrupt perjury, he or she may be indicted therefor, and being thereof convicted, shall suffer imprisonment for a term not less than two years, nor exceeding ten years.

SEC. 22. *And be it further enacted*, That every bankrupt, having surrendered, shall, at all seasonable times before the expiration of the said forty-two days, as aforesaid, or of such further time as shall be allowed to finish his or her examination, be at liberty to inspect his or her books and writings, in the presence of some person to be appointed by the commissioners, and to bring with him or her, for his or her assistance, such persons as he or she shall think fit, not exceeding two at one time, and to make extracts and copies to enable him or her to make a full discovery of his or her effects; and the said bankrupt shall be free from arrests, in coming to surrender, and after having surrendered to the said commissioners, for the said forty-two days, or such farther time as shall be allowed for the finishing his or her examination; and in case such bankrupt shall be arrested for debt, or taken on any escape warrant or execution, coming to surrender, or after his surrender within the time before mentioned, then on producing such summons or notice under the hand of the commissioners, and giving the officer a copy thereof, he or she shall be discharged; and in case any officer shall afterwards detain such bankrupt, such officer shall forfeit to such bankrupt for his or her own use, ten dollars for every day he shall detain the bankrupt.

SEC. 23. *And be it further enacted*, That every person who shall knowingly or wilfully receive or keep concealed any bankrupt, so as aforesaid summoned to appear, or who shall assist such bankrupt in concealing him or herself, or in absconding, shall suffer such imprisonment, not exceeding twelve months, or pay such fine to the United States, not exceeding one thousand dollars, as upon conviction thereof shall be adjudged.

SEC. 24. *And be it further enacted*, That the said commissioners shall have power to examine, upon oath or affirmation, the wife of any person lawfully declared a bankrupt, for the discovery of such part of his estate as may be concealed or disposed of by such wife, or by any other person; and the said wife shall incur such penalties for not appearing before the said commissioners, or refusing to be sworn or affirmed, or examined, and to subscribe her examination, or for not disclosing the truth, as by this act is provided against any other person in like cases.

SEC. 25. *And be it further enacted*, That in case any person shall be committed by the commissioners for refusing to answer, or for not fully answering any question, or for any other cause, the commissioners shall, in their warrant, specify such question or other cause of commitment.

SEC. 26. *And be it further enacted*, That if after the bankrupt shall have finished his or her final examination, any other person or persons shall voluntarily make discovery of any part of such bankrupt's estate, before unknown to the commissioners, such person or persons shall be entitled to five per cent. out of the effects so discovered, and such further reward as the commissioners shall think proper; and any trustee having notice of the bankruptcy, wilfully concealing the estate of any bankrupt, for the space of ten days after the bankrupt shall have finished his final examination, as aforesaid, shall forfeit double the value of the estate so concealed, for the benefit of the creditors.

SEC. 27. *And be it further enacted*, That if any person shall become bankrupt, and at such time, by consent of the owner, have in his or her possession and disposition, any goods whereof he or she shall be reputed owner, and take upon him or herself, the sale, alteration, or disposition thereof, as owner, the commissioners shall have power to assign the same, for the benefit of the creditors, as fully as any other part of the estate of the bankrupt.

SEC. 28. *And be it further enacted*, That if any bankrupt, after the issuing any commission against him or her, pay to the person who sued out the same, or give or deliver to such person, goods or any other satisfaction or security for his or her debt, whereby such person shall privately have and receive a greater proportion of his or her debt than the other creditors, such preference shall be a new act of bankruptcy, and on good proof thereof, such commission shall and may be superseded, and it shall and may be lawful for either of the judges, having authority to grant the commission as aforesaid, to award any creditor petitioning another commission, and such

persons so taking such undue satisfaction as aforesaid, shall forfeit and lose, as well his or her whole debts, as the whole he or she shall have taken and received, and shall pay back, or deliver up the same, or the full value thereof, to the assignee or assignees who shall be appointed or chosen under such commission, in manner aforesaid, in trust for, and to be divided among the other creditors of the said bankrupt, in proportion to their respective debts.

SEC. 29. *And be it further enacted*, That every person who shall be chosen assignee of the estate and effects of a bankrupt, shall, at some time after the expiration of four months, and within twelve months from the time of issuing the commission, cause at least thirty days public notice to be given, of the time and place the commissioners and assignees intend to meet, to make a dividend or distribution of the bankrupt's estate and effects; at which time the creditors who have not before proved their debts, shall be at liberty to prove the same; and upon every such meeting, the assignee or assignees shall produce to the commissioners and creditors then present, fair and just accounts of all his or their receipts and payments, touching the bankrupt's estate and effects, and of what shall remain outstanding, and the particulars thereof, and shall, if the creditors then present, or a major part of them, require the same, be examined upon oath or solemn affirmation, before the same commissioners, touching the truth of such accounts; and in such accounts, the said assignee or assignees shall be allowed and retain all such sum and sums of money, as they shall have paid or expended in suing out and prosecuting the commission, and all other just allowances on account of, or by reason or means of their being assignee or assignees; and the said commissioners shall order such part of the nett produce of the said bankrupt's estate, as by such accounts or otherwise shall appear to be in the hands of the said assignees, as they shall think fit, to be forthwith divided among such of the bankrupt's creditors as have duly proved their debts under such commission, in proportion to their several and respective debts; and the commissioners shall make such their order for a dividend in writing, under their hands, and shall cause one part of such order to be filed amongst the proceedings under the said commission, and shall deliver unto each of the assignees under such commission, a duplicate of such their order, which order of distribution shall contain an account of the time and place of making such order, and the sum total or quantum of all the debts proved under the commission, and the sum total of the money remaining in the hands of the assignee or assignees to be divided, and how many per cent. in par-

ticular is there ordered to be paid to every creditor of his debt; and the said assignee or assignees in pursuance of such order, and without any deed or deeds of distribution, to be made for the purpose, shall forthwith make such dividend and distribution accordingly, and shall take receipts in a book to be kept for the purpose, from each creditor, for the part or share of such dividend or distribution, which he or they shall make, and pay to each creditor respectively; and such order and receipt shall be a full and effectual discharge to such assignee for so much as he shall fairly pay, pursuant to such order as aforesaid.

SEC. 30. *And be it further enacted*, That within eighteen months next after the issuing of the commission, the assignee or assignees shall make a second dividend of the bankrupt's estate and effects, in case the same were not wholly divided upon the first dividend, and shall cause due public notice to be given of the time and place the said commissioners intend to meet, to make a second distribution of the bankrupt's estate and effects, and for the creditors who shall not before have proved their debts, to come in and prove the same; and at such meeting, the said assignees shall produce, on oath or solemn affirmation as aforesaid, their accounts of the bankrupt's estate and effects, and what, upon the balance thereof, shall appear to be in their hands, shall by like order of the commissioners, be forthwith divided amongst such of the bankrupt's creditors as shall have made due proof of their debts, in proportion to their several and respective debts; which second dividend shall be final, unless any suit at law, or equity, be depending, or any part of the estate standing out, that could not have been disposed of, or that the major part of the creditors shall not have agreed to be sold or disposed of, or unless some other or future estate or effects of the bankrupt shall afterwards come to, or rest in the said assignees, in which cases the said assignees shall, as soon as may be, convert such future or other estate and effects into money, and shall, within two months after the same be converted into money, by like order of the commissioners, divide the same among such bankrupt's creditors as shall have made due proof of their debt under such commission.

SEC. 31. *And be it further enacted*, That in the distribution of the bankrupt's effects, there shall be paid to every of the creditors a portion-rate, according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance, or specialty, or having an attachment under any of the laws of the individual states, or of the United States, on the estate of such bankrupt, (*Provided*, there be no execution executed upon

any of the real or personal estate of such bankrupt, before the time he or she became bankrupts) shall not be relieved upon any such judgment, statute, recognizance, specialty, or attachment, for more than a rateable part of his debt, with the other creditors of the bankrupt.

SEC. 32. *And be it further enacted*, That the assignees shall keep one or more distinct book or books of account, wherein he or they shall duly enter all sums of money or effects, which he or they shall have received, or got into his or their possession, of the said bankrupt's estate, to which books of account, every creditor who shall have proved his or her debt, shall, at all reasonable times, have free resort, and inspect the same as often as he or she shall think fit.

SEC. 33. *And be it further enacted*, That every bankrupt, not being in prison or custody, shall, at all times after his surrender, be bound to attend the assignees, upon every reasonable notice, in writing, for that purpose, given or left at the usual place of his or her abode, in order to assist in making out the accounts of the said bankrupt's estate and effects, and to attend any court of record, to be examined touching the same, or such other business, as the said assignees shall judge necessary, for which he shall receive three dollars per day.

SEC. 34. *And be it further enacted*, That all and every person and persons who shall become bankrupt as aforesaid, and who shall, within the time limited by this act, surrender him or herself to the commissioners, and in all things conform as in and by this act is directed, shall be allowed five per cent. upon the nett produce of all the estate that shall be recovered in and received, which shall be paid unto him or her by the assignee or assignees, in case the nett produce of such estate, after such allowance made, shall be sufficient to pay the creditors of said bankrupt, who shall have proved their debts under such commission, the amount of fifty per cent. on their said debts, respectively, and so as the said five per cent. shall not exceed, in the whole, the sum of five hundred dollars; and in case the nett produce of the said estate shall, over and above the allowance hereafter mentioned, be sufficient to pay the said creditors seventy-five per cent. on the amount of their said debts, respectively, that then the said bankrupt shall be allowed ten per cent. on the amount of such nett produce, to be paid as aforesaid, so as such ten per cent. shall not, in the whole, exceed the sum of eight hundred dollars; and every such bankrupt shall be discharged from all debts by him or her due or owing, at the time he or she became

bankrupt, and all which were or might have been proved under the said commission; and in case any such bankrupt shall afterwards be arrested, prosecuted, or impleaded, for or on account of any of the said debts, such bankrupt may appear without bail, and may plead the general issue, and give this act, and the special matter in evidence. And the certificate of such bankrupt's conforming, and the allowance thereof, according to the directions of this act, shall be, and shall be allowed to be, sufficient evidence, *prima facie*, of the party's being a bankrupt within the meaning of this act, and of the commission and other proceedings precedent to the obtaining such certificate, and a verdict shall thereupon pass for the defendant, unless the plaintiff in such action can prove the said certificate was obtained unfairly, and by fraud, or unless he can make appear any concealment of estate or effects, by such bankrupt to the value of one hundred dollars. *Provided*, That no such discharge of a bankrupt, shall release or discharge any person who was a partner with such bankrupt, at the time he or she became bankrupt, or who was then jointly held or bound with such bankrupt for the same debt or debts from which such bankrupt was discharged as aforesaid.

SEC. 35. *Provided always, and be it further enacted*, That if the nett proceeds of the bankrupt's estate, so to be discovered, recovered and received, shall not amount to so much as will pay all and every of the creditors of the said bankrupt, who shall have proved their debts under the said commission, the amount of fifty per cent. on their debts respectively, after all charges first deducted, that then, and in such case, the bankrupt shall not be allowed five per centum on such estate as shall be recovered in, but shall have and be paid by the assignees so much money as the commissioners shall think fit to allow, not more than three hundred dollars, nor exceeding three per centum on the nett proceeds of the said bankrupt's estate.

SEC. 36. *Provided also, and be it further enacted*, That no person becoming a bankrupt according to the intent and provisions of this act, shall be entitled to a certificate of discharge, or to any of the benefits of the act, unless the commissioners shall certify under their hands, to the judge of the district within which such commission issues, that such bankrupt hath made a full discovery of his or her estate and effects, and in all things conformed him or herself to the directions of this act, and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same was not a full discovery of the said bankrupt's estate and effects; or unless the said judge should be of opinion that the said certificate

was unreasonably denied by the commissioners; and unless two thirds, in number and in value, of the creditors of the bankrupt, who shall be creditors for not less than fifty dollars respectively, and who shall have duly proved their debts under the said commission, shall sign such certificate to the judge, and testify their consent to the allowance of a certificate of discharge, in pursuance of this act; which signing and consent shall be also certified by the commissioners; but the said commissioners shall not certify the same till they have proof by affidavit or affirmation, in writing, of such creditors, or of the persons respectively authorized for that purpose, signing the said certificate; which affidavit or affirmation, together with the letter or power of attorney to sign, shall be laid before the judge of the district within which such commission issues, in order for the allowing the certificate of discharge, and the said certificate shall not be allowed unless the bankrupt make oath or affirmation in writing, that the certificate of the commissioners, and consent of the creditors thereunto were obtained fairly and without fraud; and any of the creditors of the said bankrupt are allowed to be heard, if they shall think fit, before the respective persons aforesaid, against the making or allowing of such certificates by the commissioners or judge.

SEC. 37. *And be it further enacted*, That if any creditor, or pretended creditor, of any bankrupt, shall exhibit to the commissioners any fictitious or false debt, or demand, with intent to defraud the real creditors of such bankrupt, and the bankrupt shall refuse to make discovery thereof, and suffer the fair creditors to be imposed upon, he shall lose all title to the allowance upon the amount of his effects, and to a certificate of discharge as aforesaid, nor shall he be entitled to the said allowance or certificate, if he has lost at any one time fifty dollars, or in the whole three hundred dollars, after the passing of this act, and within twelve months before he became bankrupt, by any manner of gaming or wagering whatever.

SEC. 38. *And be it further enacted*, That if any bankrupt, who shall have obtained his certificate, shall be taken in execution or detained in prison, on account of any debts owing before he became a bankrupt, by reason that judgment was obtained before such certificate was allowed, it shall be lawful for any of the judges of the court wherein judgment was so obtained, or for any court, judge, or justice, within the district in which such bankrupt shall be detained, having powers to award or allow the writ of habeas corpus, on such bankrupt producing his certificate so as aforesaid allowed,

to order any sheriff or gaoler who shall have such bankrupt in custody, to discharge such bankrupt without fee or charge, first giving reasonable notice to the plaintiff, or his attorney, of the motion for such discharge.

SEC. 39. *And be it further enacted*, That every person who shall have *bona fide* given credit to or taken securities, payable at future days, from persons who are or shall become bankrupts, not due at the time of such persons becoming bankrupt, shall be admitted to prove their debts and contracts, as if they were payable presently, and shall have a dividend in proportion to the other creditors, discounting, where no interest is payable, at the rate of so much per centum per annum, as is equal to the lawful interest of the state where the debt was payable; and the obligee of any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to claim, and after the contingency or loss, to prove the debt thereon, in like manner as if the same had happened before issuing the commission; and the bankrupt shall be discharged from such securities, as if such money had been due and payable before the time of his or her becoming bankrupt; and such creditors may petition for a commission, or join in petitioning.

SEC. 40. *And be it further enacted*, That in case any person, committed by the commissioners' warrant, shall obtain a *habeas corpus*, in order to be discharged, and there shall appear any insufficiency in the form of the warrant, it shall be lawful for the court or judge before whom such party shall be brought by *habeas corpus*, by rule or warrant, to commit such persons to the same prison, there to remain until he shall conform as aforesaid, unless it shall be made to appear that he had fully answered all lawful questions put to him by the commissioners; or in case such person was committed for not signing his examination, unless it shall appear that the party had good reason for refusing to sign the same, or that the commissioners had exceeded their authority in making such commitment; and in case the gaoler to whom such person shall be committed, shall wilfully or negligently suffer such person to escape, or go without the doors or walls of the prison, such gaoler shall, for such offence, being convicted thereof, forfeit a sum not exceeding three thousand dollars for the use of the creditors.

SEC. 41. *And be it further enacted*, That the gaoler shall, upon the request of any creditor, having proved his debt, and showing a certificate thereof, under the hands of the commissioners, which the commissioners shall give without fee or reward, produce the person so committed; and in case such gaoler shall refuse to show such

person to such creditor, requesting the same, such person shall be considered as having escaped, and the gaoler or sheriff so refusing, shall be liable as for a wilful escape.

SEC. 42. *And be it further enacted*, That where it shall appear to the said commissioners that there hath been mutual credit given by the bankrupt, and any other person, or mutual debts between them at any time before such person became bankrupt, the assignee or assignees of the estate shall state the account between them, and one debt may be set off against the other, and what shall appear to be due on either side on the balance of such account after such set off, and no more, shall be claimed or paid on either side respectively.

SEC. 43. *And be it further enacted*, That it shall and may be lawful to and for the assignee or assignees of any bankrupt's estate and effects, under the direction of the commissioners, and by and with the consent of the major part in value of such of the said bankrupt's creditors, as shall have duly proved their debts under the commission, and shall be present at any meeting of the said creditors, to be held in pursuance of due and public notice for that purpose given, to submit any difference or dispute for, on account of, or by reason or means of, any matter, cause, or thing whatsoever, relating to such bankrupt, or to his or her estate or effects, to the final end and determination of arbitrators to be chosen by the said commissioners, and the major part in value of such creditors as shall be present at such meeting as aforesaid, and the party or parties with whom they shall have such difference or dispute, and to perform the award of such arbitrators, or otherwise to compound and agree the matter in difference and dispute as aforesaid, in such manner as the said assignee or assignees, under the direction and with the consent aforesaid, shall think fit and can agree; and the same shall be binding on the several creditors of the said bankrupt, and the said assignee or assignees are hereby indemnified for what they shall fairly do, according to the directions aforesaid.

SEC. 44. *And be it further enacted*, That the assignees shall be, and hereby are vested with full power to dispose of all the bankrupt's estate, real and personal, at public auction or vendue, without being subject to any tax, duty, imposition, or restriction, any law to the contrary notwithstanding.

SEC. 45. *And be it further enacted*, That if after any commission of bankruptcy, sued forth, the bankrupt happen to die before the commissioners shall have distributed the effects, or any part thereof, the commissioners shall, nevertheless, proceed to execute the commission, as fully as they might have done if the party were living.

SEC. 46. *And be it further enacted*, That where any commission of bankruptcy shall be delivered to the commissioners, therein named, to be executed, it shall and may be lawful for them before they take the oath or affirmation of qualification, to demand and take from the creditor or creditors prosecuting such commission, a bond with one good security, if required, in the penalty of one thousand dollars, conditioned for the payment of the costs, charges, and expenses, which shall arise and accrue upon the prosecution of the said commission: *Provided always*, that the expenses, so as aforesaid to be secured and paid by the petitioning creditor or creditors, shall be repaid to him or them by the commissioners or assignees, out of the first monies arising from the bankrupt's estate or effects, if so much be received therefrom.

SEC. 47. *And be it further enacted*, That the district judges, in each district respectively, shall fix a rate of allowance to be made to the commissioners of bankruptcy, as compensation of services to be rendered under the commission, and it shall be lawful for any creditor, by petition to the district judge, to except to any charge contained in the account of the commissioners; and the said judge, after hearing the commissioners, may in a summary way decide upon the validity of such exception.

SEC. 48. *And be it further enacted*, That all penalties given by this act for the benefit of the creditors, shall be recovered by the assignee or assignees by action of debt, and the money so recovered, the charges of suit being deducted, shall be distributed towards payment of the creditors.

SEC. 49. *And be it further enacted*, That if any action shall be brought against any commissioner, or assignee, or other person, having authority under the commission, for anything done or performed by force of this act, the defendant may plead the general issue, and give this act and the special matter in evidence; and in case of a nonsuit, discontinuance, or verdict or judgment for him, he shall recover double costs.

SEC. 50. *And be it further enacted*, That if any estate real or personal shall descend, revert to, or become vested in any person, after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate, signed by the judge as aforesaid, all such estate shall, by virtue of this act, be vested in the said commissioners, and shall be by them assigned and conveyed to the assignee or assignees in fee simple, or otherwise, in like manner as above directed, with the estate of the said bankrupt, at the time of the bankruptcy, and the proceeds thereof shall be divided among the creditors.

SEC. 51. *And be it further enacted*, That the said commissioners shall, once in every year, carefully file, in the clerk's office of the district court, all the proceedings had in every case before them, and which shall have been finished, including the commissions, examinations, dividends, entries, and other determinations of the said commissioners, in which office, the final certificate of the said bankrupt may also be recorded; all which proceedings shall remain of record in the said office, and certified copies thereof shall be admitted as evidence in all courts, in like manner as the copies of the proceedings of the said district court are admitted in other cases.

SEC. 52. *And be it further enacted*, That it shall and may be lawful for any creditor of such bankrupt, to attend all or any of the examinations of said bankrupt, and the allowance of the final certificate, if he shall think proper, and then and there to propose interrogatories, to be put by the judge or commissioners to the said bankrupt and others, and also to produce and examine witnesses and documents before such judge or commissioners, relative to the subject matter before them. And in case either the bankrupt or creditor shall think him or herself aggrieved by the determination of the said judge or commissioners, relative to any material fact, in the commencement or progress of the said proceedings, or in the allowance of the certificate aforesaid, it shall and may be lawful for either party to petition the said judge, setting forth such facts and the determination thereon, with the complaint of the party, and a prayer for trial by a jury to determine the same, and the said judge shall, in his discretion, make order thereon, and award a *venire facias* to the marshal of the district, returnable within fifteen days before him, for the trial of the facts mentioned in the said petition, notice whereof shall be given to the commissioners and creditors concerned in the same; at which time the said trial shall be had, unless, on good cause shown, the judge shall give farther time, and judgment being entered on the verdict of the jury, shall be final, on the said facts, and the judge or commissioners shall proceed agreeably thereto.

SEC. 53. *And be it further enacted*, That the commissioners before the appointment of assignees, and the assignees after such appointment, may, from time to time, make such allowance out of the bankrupt's estate until he shall have obtained his final discharge, as in their opinion may be requisite for the necessary support of the said bankrupt and his family.

SEC. 54. *And be it further enacted*, That it shall be lawful for the major part in value of the creditors, before they proceed to the

choice of assignees, to direct in what manner, with whom, and where the monies arising by, and to be received from time to time out of the bankrupt's estate, shall be lodged, until the same shall be divided among the creditors, as herein provided; to which direction every such assignee and assignees shall conform as often as three hundred dollars shall be received.

SEC. 55. *And be it further enacted*, That every matter and thing by this act, required to be done by the commissioners of any bankrupt, shall be valid to all intents and purposes, if performed by a majority of them.

SEC. 56. *And be it further enacted*, That in all cases where the assignees shall prosecute any debtor of the bankrupt for any debt, duty or demand, the commission, or a certified copy thereof, and the assignment of the commissioners of the bankrupt's estate, shall be conclusive evidence of the issuing the commission, and of the person named therein, being a trader and bankrupt, at the time mentioned therein.

SEC. 57. *And be it further enacted*, That every person obtaining a discharge from his debts, by certificate as aforesaid, granted under a commission of bankruptcy, shall not, on any future commission, be entitled to any other certificate than a discharge of his person only; unless the nett proceeds of the estate and effects of such person so becoming bankrupt a second time, shall be sufficient to pay seventy-five per cent. to his or her creditors on the amount of their debts respectively.

SEC. 58. *And be it further enacted*, That any creditor of a person, against whom a commission of bankruptcy shall have been sued forth, and who shall lay his claim before the commissioners appointed in pursuance of this act, may at the same time declare his unwillingness to submit the same to the judgment of the said commissioners, and his wish that a jury may be impanelled to decide thereon: And in like manner the assignee or assignees of such bankrupt may object to the consideration of any particular claim by the commissioners, and require that the same should be referred to a jury. In either case, such objection and request shall be entered on the books of the commissioners, and thereupon an issue shall be made up between the parties, and a jury shall be impanelled, as in other cases, to try the same in the circuit court for the district in which such bankrupt has usually resided. The verdict of such jury shall be subject to the control of the court, as in suits originally instituted in the said court, and when rendered, if not set aside by the court, shall be certified to the commissioners, and shall ascer-

tain the amount of any such claim, and such creditor or creditors shall be considered in all respects as having proved their debts under the commission.

SEC. 59. *And be it further enacted*, That the lands and effects of any person becoming bankrupt may be sold on such credit, and on such security, as a major part in value of the creditors may direct: *Provided*, nothing herein contained shall be allowed so to operate, as to retard the granting the bankrupt's certificate.

SEC. 60. *And be it further enacted*, That if any person becoming bankrupt, shall be in prison, it shall be lawful for any creditor or creditors, at whose suit he or she shall be in execution, to discharge him or her from custody, or if such creditor or creditors shall refuse to do so, the prisoner may petition the commissioners, to liberate him or her, and thereupon, if, in the opinion of the commissioners, the conduct of such bankrupt shall have been fair, so as to entitle him or her in their opinion, to a certificate, when by law such certificate might be given, it shall be lawful for them to direct the discharge of such prisoner, and to enter the same in their books, which being notified to the keeper of the gaol in which such prisoner may be confined, shall be a sufficient authority for his or her discharge: *Provided*, that in either case, such discharge shall be no bar to another execution, if a certificate shall be refused to such bankrupt: *And provided also*, that it shall be no bar to a subsequent imprisonment of such bankrupt by order of the commissioners, in conformity with the provisions of this act.

SEC. 61. *And be it further enacted*, That this act shall not repeal or annul, or be construed to repeal or annul the laws of any state now in force, or which may be hereafter enacted, for the relief of insolvent debtors, except so far as the same may respect persons, who are, or may be clearly within the purview of this act, and whose debts shall amount in the cases specified in the second section thereof to the sums therein mentioned. And if any person within the purview of this act, shall be imprisoned for the space of three months, for any debt, or upon any contract, unless the creditors of such prisoner shall proceed to prosecute a commission of bankruptcy against him or her, agreeably to the provisions of this act, such debtor may and shall be entitled to relief, under any such laws for the relief of insolvent debtors, this act notwithstanding.

SEC. 62. *And be it further enacted*, That nothing contained in this law shall, in any manner, affect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or

impair any right to, or security for, money due to the United States or to any of them.

SEC. 63. *And be it further enacted*, That nothing contained in this act, shall be taken, or construed to invalidate, or impair any lien existing at the date of this act, upon the lands or chattels of any person who may have become a bankrupt.

SEC. 64. *And be it further enacted*, That this act shall continue in force during the term of five years, and from thence to the end of the next session of Congress thereafter, and no longer: *Provided*, that the expiration of this act shall not prevent the complete execution of any commission which may have been previously thereto issued.

Approved, April 4, 1800.

Act of February 13, 1801, c. 4, 2 Stat. 92. — SEC. 12. *And be it further enacted*, That the said circuit courts respectively shall have cognizance concurrently with the district courts, of all cases which shall arise, within their respective circuits, under the act to establish an uniform system of bankruptcy throughout the United States; and that each circuit judge, within his respective circuit, shall and may perform all and singular the duties enjoined by the said act, upon a judge of a district court: and that the proceedings under a commission of bankruptcy, which shall issue from a circuit judge, shall in all respects be conformable to the proceedings under a commission of bankruptcy, which shall issue from a district judge, mutatis mutandis.

Act of April 29, 1802, c. 31, 2 Stat. 164. — SEC. 11. *And be it further enacted*, That in all cases in which proceedings shall, on the said first day of July next, be pending under a commission of bankruptcy issued in pursuance of the aforesaid act, intituled "An act to provide for the more convenient organization of the courts of the United States," the cognizance of the same shall be, and hereby is transferred to, and vested in, the district judge of the district within which such commission shall have issued, who is hereby empowered to proceed therein in the same manner and to the same effect, as if such commission of bankruptcy had been issued by his order.

Act of December 19, 1803, c. 6, 2 Stat. 248. — *An Act to repeal an act, intituled "An act to establish an uniform system of Bankruptcy throughout the United States."*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of Congress passed on the fourth day of April, one thousand eight hundred, intituled "An act to establish an uniform system of bankruptcy throughout the United States," shall be, and the same is hereby repealed. *Provided, nevertheless*, that the repeal of the said act shall in nowise affect the execution of any commission of bankruptcy which may have been issued prior to the passing of this act, but every such commission may and shall be proceeded on and fully executed as though this act had not passed.

Approved, December 19, 1803.

ACT OF 1841.

Act of August 19, 1841, c. 9, 5 Stat. 440. — *An Act to establish a uniform system of bankruptcy throughout the United States.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, established throughout the United States, a uniform system of bankruptcy, as follows: All persons whatsoever, residing in any State, District or Territory of the United States, owing debts, which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, who shall, by petition, setting forth to the best of his knowledge and belief, a list of his or their creditors, their respective places of residence, and the amount due to each, together with an accurate inventory of his or their property, rights, and credits, of every name, kind, and description, and the location and situation of each and every parcel and portion thereof, verified by oath, or, if conscientiously scrupulous of taking an oath, by solemn affirmation, apply to the proper court, as hereinafter mentioned, for the benefit of this act, and therein declare themselves to be unable to meet their debts and engagements, shall be deemed bankrupts within the purview of this act, and may be so declared accordingly by a decree of such court; all persons, being merchants, or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters, or marine insurers, owing debts to the amount

of not less than two thousand dollars, shall be liable to become bankrupts within the true intent and meaning of this act, and may, upon the petition of one or more of their creditors, to whom they owe debts amounting in the whole to not less than five hundred dollars, to the appropriate court, be so declared accordingly, in the following cases, to wit: whenever such person, being a merchant, or actually using the trade of merchandise, or being a retailer of merchandise, or being a banker, factor, broker, underwriter, or marine insurer, shall depart from the State, District, or Territory, of which he is an inhabitant, with intent to defraud his creditors; or shall conceal himself to avoid being arrested; or shall willingly or fraudulently procure himself to be arrested, or his goods and chattels, lands, or tenements, to be attached, distrained, sequestered, or taken in execution; or shall remove his goods, chattels, and effects, or conceal them to prevent their being levied upon, or taken in execution, or by other process; or make any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods or chattels, credits, or evidence of debt: *Provided, however*, That any person so declared a bankrupt, at the instance of a creditor, may, at his election, by petition to such court within ten days after its decree, be entitled to a trial by jury before such court, to ascertain the fact of such bankruptcy; or if such person shall reside at a great distance from the place of holding such court, the said judge, in his discretion, may direct such trial by jury to be had in the county of such person's residence, in such manner, and under such directions, as the said court may prescribe and give; and all such decrees passed by such court, and not so re-examined, shall be deemed final and conclusive as to the subject-matter thereof.

SEC. 2. *And be it further enacted*, That all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, surety, or other person, any preference or priority over the general creditors of such bankrupts; and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt in contemplation of bankruptcy, to any person or persons whatever, not being a bona fide creditor or purchaser, for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive the same as part of the assets of the bankruptcy; and the person making such unlawful preferences and payments shall receive no discharge under the provisions of this act:

Provided, That all dealings and transactions by and with any bankrupt, bona fide made and entered into more than two months before the petition filed against him, or by him, shall not be invalidated or affected by this act: *Provided*, That the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act. And in case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, subsequent to the first day of January last, or at any other time, in contemplation of the passage of a bankrupt law, by assignments or otherwise, given or secured any preference to one creditor over another, he shall not receive a discharge unless the same be assented to by a majority in interest of those of his creditors who have not been so preferred: *And provided, also*, That nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women, or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act.

SEC. 3. *And be it further enacted*, That all the property, and rights of property, of every name and nature, and whether real, personal, or mixed, of every bankrupt, except as is hereinafter provided, who shall, by a decree of the proper court, be declared to be a bankrupt within this act, shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment, or other conveyance whatsoever; and the same shall be vested, by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this purpose, which power of appointment and removal such court may exercise at its discretion, toties quoties; and the assignee so appointed shall be vested with all the rights, titles, powers, and authorities to sell, manage, and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully, to all intents and purposes, as if the same were vested in, or might be exercised by, such bankrupt before or at the time of his bankruptcy declared as aforesaid; and all suits in law or in equity, then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way, and with the same effect as they might have been by such bankrupt; and no suit commenced by or against any assignee shall be abated by his death or removal from

office, but the same may be prosecuted or defended by his successor in the same office; *Provided, however*, That there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of three hundred dollars; and, also, the wearing apparel of such bankrupt, and that of his wife and children; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of said court.

SEC. 4. *And be it further enacted*, That every bankrupt, who shall bona fide surrender all his property, and rights of property, with the exception before mentioned, for the benefit of his creditors, and shall fully comply with and obey all the orders and directions which may from time to time be passed by the proper court, and shall otherwise conform to all the other requisitions of this act, shall (unless a majority in number and value of his creditors who have proved their debts, shall file their written dissent thereto) be entitled to a full discharge from all his debts, to be decreed and allowed by the court which has declared him a bankrupt, and a certificate thereof granted to him by such court accordingly, upon his petition filed for such purpose; such discharge and certificate not, however, to be granted until after ninety days from the decree of bankruptcy, nor until after seventy days' notice in some public newspaper, designated by such court, to all creditors who have proved their debts, and other persons in interest, to appear at a particular time and place, to show cause why such discharge and certificate shall not be granted; at which time and place any such creditors, or other persons in interest, may appear and contest the right of the bankrupt thereto: *Provided*, That in all cases where the residence of the creditor is known, a service on him personally, or by letter addressed to him at his known usual place of residence, shall be prescribed by the court, as in their discretion shall seem proper, having regard to the distance at which the creditor resides from such court. And if any such bankrupt shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors contrary to the provisions of this act, or shall wilfully omit or refuse to comply with any orders or directions of such court, or to conform to any other requisites of this act, or shall, in the proceedings under this act, admit a false or fictitious debt against his estate, he shall not be entitled to any such discharge or certificate; nor shall any person,

being a merchant, banker, factor, broker, underwriter, or marine insurer, be entitled to any such discharge or certificate, who shall become bankrupt, and who shall not have kept proper books of account, after the passing of this act; nor any person who, after the passing of this act, shall apply trust funds to his own use: *Provided*, That no discharge of any bankrupt under this act shall release or discharge any person who may be liable for the same debt as a partner, joint contractor, endorser, surety, or otherwise, for or with the bankrupt. And such bankrupt shall at all times be subject to examination, orally, or upon written interrogatories, in and before such court, or any commission appointed by the court therefor, on oath, or, if conscientiously scrupulous of taking an oath, upon his solemn affirmation, in all matters relating to such bankruptcy, and his acts and doings, and his property and rights of property, which, in the judgment of such court, are necessary and proper for the purposes of justice; and if in any such examination, he shall wilfully and corruptly answer, or swear, or affirm, falsely, he shall be deemed guilty of perjury, and shall be punishable therefor, in like manner as the crime of perjury is now punishable by the laws of the United States; and such discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are proveable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property or rights of property, as aforesaid, contrary to the provisions of this act, on prior reasonable notice specifying in writing such fraud or concealment; and if, in any case of bankruptcy, a majority, in number and value, of the creditors who shall have proved their debts at the time of hearing of the petition of the bankrupt for a discharge as hereinbefore provided, shall at such hearing file their written dissent to the allowance of a discharge and certificate to such bankrupt, or if, upon such hearing, a discharge shall not be decreed to him, the bankrupt may demand a trial by jury upon a proper issue to be directed by the court, at such time and place, and in such manner, as the court may order; or he may appeal from that decision, at any time within ten days thereafter, to the circuit court next to be held for the same district, by simply entering in the district court, or with the clerk thereof, upon record, his prayer for an appeal. The appeal shall be tried at the first term of the circuit court after it be taken, unless, for sufficient reason, a continuance

be granted; and it may be heard and determined by said court summarily, or by a jury, at the option of the bankrupt; and the creditors may appear and object against a decree of discharge and the allowance of the certificate, as hereinbefore provided. And if, upon a full hearing of the parties, it shall appear to the satisfaction of the court, or the jury shall find that the bankrupt has made a full disclosure and surrender of all his estate, as by this act required, and has in all things conformed to the directions thereof, the court shall make a decree of discharge, and grant a certificate, as provided in this act.

SEC. 5. *And be it further enacted*, That all creditors coming in and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona fide debts, shall be entitled to share in the bankrupt's property and effects, pro rata, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars; *Provided*, That such labor shall have been performed within six months next before the bankruptcy of his employer; and all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, endorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in presenti; and no creditor or other person, coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby; and in all cases where there are mutual debts or mutual credits between the parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off; all such proof of debts shall be made before the court decreeing the

bankruptcy, or before some commissioner appointed by the court for that purpose; but such court shall have full power to set aside and disallow any debt, upon proof that such debt is founded in fraud, imposition, illegality, or mistake; and corporations to whom any debts are due, may make proof thereof by their president, cashier, treasurer, or other officer, who may be specially appointed for that purpose; and in appointing commissioners to receive proof of debts, and perform other duties, under the provisions of this act, the said court shall appoint such persons as have their residence in the county in which the bankrupt lives.

SEC. 6. *And be it further enacted*, That the district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act, and any other act which may hereafter be passed on the subject of bankruptcy; the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity; and for this purpose the said district court shall be deemed always open. And the district judge may adjourn any point or question arising in any case in bankruptcy into the circuit court for the district, in his discretion, to be there heard and determined; and for this purpose the circuit court of such district shall also be deemed always open. And the jurisdiction hereby conferred on the district court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt, and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. And the said courts shall have full authority and jurisdiction to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent the circuit courts may now do in any suit pending therein in equity. And it shall be the duty of the district court in each district, from time to time, to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy; which rules, regulations, and forms, shall be subject to be altered, added to, revised, or annulled, by the circuit court of the same district, and other rules and regulations, and forms substituted therefor; and, in all such rules, regulations, and forms, it shall be the duty of the said courts to make them as simple and brief as practicable, to the end to avoid all unnecessary

expenses, and to facilitate the use thereof by the public at large. And the said courts shall, from time to time, prescribe a tariff or table of fees and charges to be taxed by the officers of the court or other persons, for services under this act, or any other on the subject of bankruptcy; which fees shall be as low as practicable, with reference to the nature and character of such services.

SEC. 7. *And be it further enacted*, That all petitions by any bankrupt for the benefit of this act, and all petitions by a creditor against any bankrupt under this act, and all proceedings in the case to the close thereof, shall be had in the district court within and for the district in which the person supposed to be a bankrupt shall reside, or have his place of business at the time when such petition is filed, except where otherwise provided in this act. And upon every such petition, notice thereof shall be published in one or more public newspapers printed in such district, to be designated by such court at least twenty days before the hearing thereof; and all persons interested may appear at the time and place where the hearing is thus to be had, and show cause, if any they have, why the prayer of the said petitioner should not be granted; all evidence by witnesses to be used in all hearings before such court shall be under oath, or solemn affirmation, when the party is conscientiously scrupulous of taking an oath, and may be oral or by deposition, taken before such court, or before any commissioner appointed by such court, or before any disinterested State judge of the State in which the deposition is taken; and all proof of debts or other claims, by creditors entitled to prove the same by this act, shall be under oath or solemn affirmations as aforesaid, before such court or commissioner appointed thereby, or before some disinterested State judge of the State where the creditors live, in such form as may be prescribed by the rules and regulations hereinbefore authorized to be made and established by the courts having jurisdiction in bankruptcy. But all such proofs of debts and other claims shall be open to contestation in the proper court having jurisdiction over the proceedings in the particular case in bankruptcy; and as well the assignee as the creditor shall have a right to a trial by jury, upon an issue to be directed by such court, to ascertain the validity and amount of such debts or other claims; and the result therein, unless a new trial shall be granted, if in favor of the claims, shall be evidence of the validity and amount of such debts or other claims. And if any person or persons shall falsely and corruptly answer, swear, or affirm, in any hearing or on trial of any matter, or in any proceeding in such court in bankruptcy, or before any commissioner, he and they shall be deemed guilty of perjury, and punishable therefor in the manner and to the extent provided by law for other cases.

SEC. 8. *And be it further enacted*, That the circuit court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the district court of the same district of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferrable to, or vested in, such assignee; and no suit at law or in equity shall, in any case, be maintainable by or against such assignee or by or against any person claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued.

SEC. 9. *And be it further enacted*, That all sales, transfers, and other conveyances of the assignee of the bankrupt's property and rights of property, shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy; and all assets received by the assignee in money, shall, within sixty days afterwards, be paid into the court, subject to its order respecting its future safe-keeping and disposition; and the court may require of such assignee a bond, with at least two sureties, in such sum as it may deem proper, conditioned for the due and faithful discharge of all his duties, and his compliance with the orders and directions of the court; which bond shall be taken in the name of the United States, and shall, if there be any breach thereof, be sued and sueable, under the order of such court, for the benefit of the creditors and other persons in interest.

SEC. 10. *And be it further enacted*, That in order to ensure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the interests of the creditors: and a dividend and distribution of such assets as shall be collected and reduced to money, or so much thereof as can be safely so disposed of, consistently with the rights and interests of third persons having adverse claims thereto, shall be made among the creditors who have proved their debts, as often as once in six months from the time of the decree declaring the bankruptcy; notice of such dividends and distribution to be given in some newspaper or newspapers in the district, designated by the court, ten days at least before the order therefor is passed; and the pendency of any suit at law or in equity, by or against such third persons, shall

not postpone such division and distribution, except so far as the assets may be necessary to satisfy the same; and all the proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled, and brought to a close, by the court, within two years after the decree declaring the bankruptcy. And where any creditor shall not have proved his debt until a dividend or distribution shall have been made and declared, he shall be entitled to be paid the same amount, pro rata, out of the remaining dividends or distributions thereafter made, as the other creditors have already received, before the latter shall be entitled to any portion thereof.

SEC. 11. *And be it further enacted*, That the assignee shall have full authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage or other pledge, or deposite, or lien upon any property, real or personal, whether payable in presenti or at a future day, and to tender a due performance of the conditions thereof. And such assignee shall also have authority, by and under the order and direction of the proper court in bankruptcy, to compound any debts, or other claims, or securities due or belonging to the estate of the bankrupt; but no such order or direction shall be made until notice of the application is given in some public newspaper in the district, to be designated by the court, ten days at least before the hearing, so that all creditors and other persons in interest may appear and show cause, if any they have, at the hearing, why the order or direction should not be passed.

SEC. 12. *And be it further enacted*, That if any person, who shall have been discharged under this act, shall afterward become bankrupt, he shall not again be entitled to a discharge under this act, unless his estate shall produce (after all charges) sufficient to pay every creditor seventy-five per cent. on the amount of the debt which shall have been allowed to each creditor.

SEC. 13. *And be it further enacted*, That the proceedings in all cases in bankruptcy shall be deemed matters of record; but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered, in the office of the court, and a docket only, or short memorandum thereof, with the numbers, kept in a book by the clerk of the court; and the clerk of the court, for affixing his name and the seal of the court to any form, or certifying a copy thereof, when required thereto, shall be entitled to receive, as compensation, the sum of twenty-five cents and no more. And no officer of the court, or commissioner, shall be allowed by the court more than one dollar for taking the proof of any debt or other claim of any creditor or other person against the estate of the bankrupt; but

he may be allowed, in addition, his actual travel expenses for that purpose.

SEC. 14. *And be it further enacted*, That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are herein exempted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignees shall also keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignees the whole of the expenses and disbursements paid by them, the nett proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the nett proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors, and if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective rights and interests therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts; and the certificate of discharge shall be granted or refused to each partner, as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone.

SEC. 15. *And be it further enacted*, That a copy of any decree of bankruptcy, and the appointment of assignees, as directed by the third section of this act, shall be recited in every deed of lands belonging to the bankrupt, sold and conveyed by any assignees under and by virtue of this act; and that such recital, together with a certified copy of such order, shall be full and complete evidence both of the bankruptcy and assignment therein recited, and supersede the necessity of any other proof of such bankruptcy and assignment to validate the said deed; and all deeds containing such recital, and

supported by such proof, shall be as effectual to pass the title of the bankrupt, of, in, and to the lands therein mentioned and described to the purchaser, as fully, to all intents and purposes, as if made by such bankrupt himself, immediately before such order.

SEC. 16. *And be it further enacted*, That all jurisdiction, power, and authority, conferred upon and vested in the district court of the United States by this act, in cases in bankruptcy, are hereby conferred upon and vested in the circuit court of the United States for the District of Columbia, and in and upon the supreme or superior courts of any of the Territories of the United States, in cases in bankruptcy, where the bankrupt resides in the said District of Columbia, or in either of the said Territories.

SEC. 17. *And be it further enacted*, That this act shall take effect from and after the first day of February next.

Approved, August 19, 1841.

Act of March 3, 1843, c. 82, 5 Stat. 614. — *An Act to repeal the bankrupt act.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved on the nineteenth day of August, eighteen hundred and forty-one, be, and the same hereby is, repealed: *Provided*, That this act shall not affect any case or proceeding in bankruptcy commenced before the passage of this act, or any pains, penalties, or forfeitures, incurred under the said act; but every such proceeding may be continued to its final consummation in like manner as if this act had not been passed.

Approved, March 3, 1843.

ACT OF 1867.

Act of March 2, 1867, c. 176, 14 Stat. 517. — *An Act to establish a uniform System of Bankruptcy throughout the United States.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the several district courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. The said

courts shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time, and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court. And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. The said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity. Said courts may sit, for the transaction of business in bankruptcy, at any place in the district, of which place and the time of holding court they shall have given notice, as well as at the places designated by law for holding such courts.

SEC. 2. *And be it further enacted*, That the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case in a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof in term time or vacation. Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee; but no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights

of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee: *Provided*, That nothing herein contained shall revive a right of action barred at the time such assignee is appointed.

Of the Administration of the Law in Courts of Bankruptcy.

Sec. 3. *And be it further enacted*, That it shall be the duty of the judges of the district courts of the United States, within and for the several districts, to appoint in each Congressional district in said districts, upon the nomination and recommendation of the Chief Justice of the Supreme Court of the United States, one or more registers in bankruptcy, to assist the judge of the district court in the performance of his duties under this act. No person shall be eligible to such appointment unless he be a counsellor of said court, or of some one of the courts of record of the State in which he resides. Before entering upon the duties of his office, every person so appointed a register in bankruptcy shall give a bond to the United States, with condition that he will faithfully discharge the duties of his office, in a sum not less than one thousand dollars, to be fixed by said court, with sureties satisfactory to said court, or to either of the said justices thereof; and he shall, in open court, take and subscribe the oath prescribed in the act entitled "An act to prescribe an oath of office, and for other purposes," approved July second, eighteen hundred and sixty-two, and also that he will not, during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district.

Sec. 4. *And be it further enacted*, That every register in bankruptcy, so appointed and qualified, shall have power, and it shall be his duty, to make adjudication of bankruptcy, to receive the surrender of any bankrupt, to administer oaths in all proceedings before him, to hold and preside at meetings of creditors, to take proof of debts, to make all computations of dividends, and all orders of distribution, and to furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case, to audit and pass accounts of assignees, to grant protection, to pass the last examination of any bankrupt in cases whenever the assignee or a creditor do not oppose, and to sit in chambers and despatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge

shall in any particular matter direct; and he shall also make short memoranda of his proceedings in each case in which he shall act, in a docket to be kept by him for that purpose, and he shall forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of said memoranda, which shall be entered by said clerk in the proper minute-book to be kept in his office, and any register of the court may act for any other register thereof: *Provided, however*, That nothing in this section contained shall empower a register to commit for contempt, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge; but in all matters where an issue of fact or of law is raised and contested by any party to the proceedings before him, it shall be his duty to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge. No register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, nor in an appeal therefrom; nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy, nor be interested in the fees or emoluments arising from either of said trusts. The fees of said registers, as established by this act, and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered in the course of proceedings authorized by this act.

SEC. 5. *And be it further enacted*, That the judge of the district court may direct a register to attend at any place within the district for the purpose of hearing such voluntary applications under this act as may not be opposed, of attending any meeting of creditors, or receiving any proof of debts, and, generally, for the prosecution of any bankruptcy or other proceedings under this act; and the travelling and incidental expenses of such register, and of any clerk or other officer attending him, incurred in so acting, shall be set[tled] by said court in accordance with the rules prescribed under the tenth section of this act, and paid out of the assets of the estate in respect of which such register has so acted; or if there be no such assets, or if the assets shall be insufficient, then such expenses shall form a part of the costs in the case or cases in which the register shall have acted in such journey, to be apportioned by the judge, and such register, so acting, shall have and exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and for requiring the production of

books, papers, and documents: *Provided, always*, That all depositions of persons and witnesses taken before said register, and all acts done by him, shall be reduced to writing, and be signed by him, and shall be filed in the clerk's office as part of the proceedings. Such register shall be subject to removal by the judge of the district court, and all vacancies occurring by such removal, or by resignation, change of residence, death or disability, shall be promptly filled by other fit persons, unless said court shall deem the continuance of the particular office unnecessary.

SEC. 6. *And be it further enacted*, That any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate, so signed shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court. In any bankruptcy, or in any other proceedings within the jurisdiction of the court, under this act, the parties concerned, or submitting to such jurisdiction, may at any stage of the proceedings, by consent, state any question or questions in a special case for the opinion of the court, and the judgment of the court shall be final unless it be agreed and stated in such special case that either party may appeal, if, in such case, an appeal is allowed by this act. The parties may also, if they think fit, agree, that upon the question or questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them either with or without costs.

SEC. 7. *And be it further enacted*, That parties and witnesses summoned before a register shall be bound to attend in pursuance of such summons at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpœna, and all persons wilfully and corruptly swearing or affirming falsely before a register shall be liable to all the penalties, punishments, and consequences of perjury. If any person examined before a register shall refuse or decline to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order

the person so acting to pay the costs thereby occasioned, if such person be compellable by law to answer such question or to sign such examination, and such person shall also be liable to be punished for contempt.

OF APPEALS AND PRACTICE.

SEC. 8. *And be it further enacted*, That appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error may be allowed to said circuit courts from said district courts in cases at law under the jurisdiction created by this act, when the debt or damages claimed amount to more than five hundred dollars, and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim may appeal from the decision of the district court to the circuit court from the same district; but no appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from. The appeal shall be entered at the term of the circuit court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same. But if the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the district court as if no appeal had been taken; and no appeal shall be allowed unless the appellant at the time of claiming the same shall give bond in man[ner] now required by law in cases of such appeals. No writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs.

SEC. 9. *And be it further enacted*, That in cases arising under this act no appeal or writ of error shall be allowed in any case from the circuit courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed two thousand dollars.

SEC. 10. *And be it further enacted*, That the justices of the Supreme Court of the United States, subject to the provisions of this act, shall frame general orders for the following purposes: —

For regulating the practice and procedure of the district courts in bankruptcy, and the several forms of petitions, orders, and other proceedings to be used in said courts in all matters under this act;

For regulating the duties of the various officers of said courts;

For regulating the fees payable and the charges and costs to be allowed, except such as are established by this act or by law, with

respect to all proceedings in bankruptcy before said courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings;

For regulating the practice and procedure upon appeals;

For regulating the filing, custody, and inspection of records;

And generally for carrying the provisions of this act into effect.

After such general orders shall have been so framed, they or any of them may be rescinded or varied, and other general orders may be framed in manner aforesaid; and all such general orders so framed shall from time to time be reported to Congress, with such suggestions as said justices may think proper.

VOLUNTARY BANKRUPTCY — COMMENCEMENT OF PROCEEDINGS.

SEC. 11. *And be it further enacted*, That if any person residing within the jurisdiction of the United States, owing debts provable under this act exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors and his desire to obtain the benefit of this act, and shall annex to his petition a schedule, verified by oath before the court or before a register in bankruptcy, or before one of the commissioners of the circuit court of the United States, containing a full and true statement of all his debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and if not known the fact to be so stated, and the sum due to each creditor; also, the nature of each debt or demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued, and a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same; and shall also annex to his petition an accurate inventory, verified in like manner, of all his estate, both real and personal, assignable under this act, describing the same and stating where it is situated, and whether there are any, and if so, what encumbrances thereon, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt: *Provided*, That all citizens of the United States petitioning to be declared bankrupt shall on filing such petition, and before

any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath shall be filed and recorded with the proceedings in bankruptcy. And the judge of the district court, or, if there be no opposing party, any register of said court, to be designated by the judge, shall forthwith, if he be satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal of said district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor, and to give such personal or other notice to any persons concerned as the warrant specifies, which notice shall state:

First. That a warrant in bankruptcy has been issued against the estate of the debtor.

Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

Of Assignments and Assignees.

Sec. 12. *And be it further enacted*, That at the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required. If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

Sec. 13. *And be it further enacted*, That the creditors shall, at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at said meeting, the judge, or if there be no opposing interest, the register, shall appoint one or

more assignees. If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election. The judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

SEC. 14. *And be it further enacted*, That as soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings: *Provided, however*, That there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; and also the wearing apparel of such bankrupt, and that of his wife and children, and the uniform, arms and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other

process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year eighteen hundred and sixty-four: *Provided*, That the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees; and in no case shall the property hereby excepted pass to the assignees, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court: *And provided further*, That no mortgage of any vessel or of any other goods or chattels, made as security for any debt or debts, in good faith and for present considerations and otherwise valid, and duly recorded, pursuant to any statute of the United States, or of any State, shall be invalidated or affected hereby; and all the property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patents and patent rights and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person arising from contract or from the unlawful taking or detention, or of injury to the property of the bankrupt, and all his rights of redeeming such property or estate, with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee; and he may sue for and recover the said estate debts and effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with the like effect as they might have been presented or defended by such bankrupt; and a copy, duly certified by the clerk of the court, under the seal thereof, of the assignment made by the judge or register, as the case may be, to him as assignee, shall be conclusive evidence of his title as such assignee to take, hold, sue for, and recover the property of the bankrupt, as hereinbefore mentioned; but no property held by the bankrupt in trust shall pass by such assignment. No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the

cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so. No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon; and no suit in which the assignee is a party shall be abated by his death or removal from office; but the same may be prosecuted and defended by his successor, or by the surviving or remaining assignee, as the case may be. The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien or other encumbrances. The debtor shall also, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt. The assignee shall immediately give notice of his appointment, by publication at least once a week for three successive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded; and the record of such assignment, or a duly certified copy thereof, shall be evidence thereof in all courts.

SEC. 15. *And be it further enacted*, That the assignee shall demand and receive, from any and all persons holding the same, all the estate assigned, or intended to be assigned, under the provisions of this act; and he shall sell all such unencumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors; but upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale as will, in its opinion, prove to the interest of the creditors; and the assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

SEC. 16. *And be it further enacted*, That the assignee shall have the like remedy to recover all said estate, debts and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If, at the time of the commencement of proceedings in bankruptcy, an action

is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him. In suits prosecuted by the assignee a certified copy of the assignment made to him by the judge or register shall be conclusive evidence of his authority to sue.

SEC. 17. *And be it further enacted*, That the assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate and apart from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be exposed or liable to be taken as his property or for the payment of his debts. When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or a register of said court, or may authorize the same to be deposited in any convenient bank upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon. He shall give written notice to all known creditors, by mail or otherwise, of all dividends, and such notice of meetings, after the first, as may be ordered by the court. He shall be allowed, and may retain out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court. He may, under the direction of the court, submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators, to be chosen by him, and the other party to the controversy, and may, under such direction, compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors.

SEC. 18. *And be it further enacted*, That the court, after due notice and hearing, may remove an assignee for any cause which, in

the judgment of the court, renders such removal necessary or expedient. At a meeting called by order of the court in its discretion for the purpose, or which shall be called upon the application of a majority of the creditors in number and value, the creditors may, with consent of [the] court, remove any assignee by such a vote as is hereinbefore provided for the choice of assignee. An assignee may, with the consent of the judge, resign his trust and be discharged therefrom. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or at its discretion by an election by the creditors, in the manner hereinbefore provided, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such person, as the court shall direct. The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee. When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen. Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfilment of the duties of any former assignee, and the rights and interests of all persons interested in the estate. No person who has received any preference contrary to the provisions of this act shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility. An assignee refusing or unreasonably neglecting to execute an instrument when lawfully required by the court, or disobeying a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

Of Debts and Proof of Claims.

Sec. 19. *And be it further enacted*, That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the

terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. If the bankrupt shall be bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained. Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt or to stand in the place of the creditor if he shall have proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules. Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods. If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. No debts other than those above specified shall be proved or allowed against the estate.

SEC. 20. *And be it further enacted*, That in all cases of mutual debts or mutual credits between the parties, the account between them

shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, That no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

SEC. 21. *And be it further enacted*, That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby; and no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid. If any bankrupt shall, at the time of adjudication, be liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two

or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also [as] a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

SEC. 22. *And be it further enacted*, That all proofs of debts against the estate of the bankrupt, by or in behalf of creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by or in behalf of non-resident debtors before any register in bankruptcy in the judicial district where such creditors or either of them reside, or before any commissioner of the circuit court authorized to administer oaths in any district. To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing on oath or solemn affirmation before the proper register or commissioner setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person, for his use, received any security or satisfaction whatever other than that by him set forth, that the claim was not procured for the purpose of influencing the proceedings under this act, and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the said claim or any part thereof, against such bankrupt, or take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person in the proceedings under this act, is or shall be in any way affected, influenced, or controlled, and no claim shall be allowed unless all the statements set forth in such deposition shall appear to be true. Such oath or solemn affirmation shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States or prevented by some other good cause from testifying, in which cases the demand may be verified in like manner by the attorney or authorized agent of the claimant testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge; or if in a foreign country, the oath of the creditor may be taken before any minister, consul, or vice-consul of the United States; and

the court may, if it shall see fit, require or receive further pertinent evidence either for or against the admission of the claim. Corporations may verify their claims by the oath or solemn affirmation of their president, cashier, or treasurer. If the proof is satisfactory to the register or commissioner, it shall be signed by the deponent, and delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time of receipt of such proof, and the amount and nature of the debts, which books shall be open to the inspection of all the creditors. The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

SEC. 23. *And be it further enacted*, That when a claim is presented for proof before the election of the assignee, and the judge entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen. Any person who, after the approval of this act shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference. The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers; and any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

SEC. 24. *And be it further enacted*, That a supposed creditor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, shall, upon entering his appeal in the circuit court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like pro-

ceedings shall thereupon be had in the pleadings, trial, and determination of the cause, as in action at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor. The final judgment of the court shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they shall be allowed out of the estate. A bill of exchange, promissory note, or other instrument, used in evidence upon the proof of a claim, and left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon.

Of Property Perishable and in Dispute.

Sec. 25. *And be it further enacted*, That when it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold, in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of; and whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any courts. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

Examination of Bankrupts.

Sec. 26. *And be it further enacted*, That the court may, on the application of the assignee in bankruptcy, or of any creditor, or with-

out any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, and his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law, which examination shall be in writing, and shall be signed by the bankrupt and filed with the other proceedings; and the court may, in like manner, require the attendance of any other person as a witness, and if such person shall fail to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person and bring him forthwith before the court, or before a register in bankruptcy, for examination as such witness. If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailer, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been had in court. The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated; and for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for a contempt of court. If the bankrupt is without the district, and unable to return and personally attend at any of the times or do any of the acts which may be specified or required pursuant to this section, and if it appears that such absence was not caused by wilful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do, with like effect as if he had not been in default. He shall also be at liberty, from time to time, upon oath to amend and correct his schedule of creditors and property, so that the same shall conform to the facts. For good cause shown, the wife of any bankrupt may be required to attend before the court, to the end that she may be examined as a witness; and if such wife do not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he shall prove to the satisfaction of the court that he was unable to procure the attendance of his wife. No bank-

rupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.

OF THE DISTRIBUTION OF THE BANKRUPT'S ESTATE.

SEC. 27. *And be it further enacted*, That all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate pro rata, without any priority or preference whatever, except that wages due from him to any operative, or clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the adjudication of bankruptcy, shall be entitled to priority, and shall be first paid in full: *Provided*, That any debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct. At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers shall be required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his hands. At such meeting the majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one half in value of the creditors shall attend such meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

In case a dividend is ordered, the register shall, within ten days after such meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward by mail to every creditor a statement of the dividend to which he is entitled, and such creditor shall be paid by the assignee in such manner as the court may direct.

SEC. 28. *And be it further enacted*, That the like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterwards come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted, the same shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires; and after the third meeting of creditors no further meeting shall be called, unless ordered by the court. If at any time there shall be in the hands of the assignee any outstanding debts or other property, due or belonging to the estate, which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, the assignee may, under the direction of the court, sell and assign such debts or other property in such manner as the court shall order. No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter. Preparatory to the final dividend, the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and such assignee shall, if required by the court, be examined as to the truth of such account, and if found correct he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their said debts. In addition to all expenses necessarily

incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars, and if, at any time, there shall not be in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him. If by accident, mistake, or other cause, without fault of the assignee, either or both of the said second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held. In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order: —

First. The fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.

Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State.

Fourth. Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

Fifth. All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed: *Always provided*, That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

Of the Bankrupt's Discharge and its Effect.

Sec. 29. *And be it further enacted*, That at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have

come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt. No discharge shall be granted, or, if granted, be valid, if the bankrupt has wilfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate or his debts, or to any other material fact; or if he has concealed any part of his estate or effects, or any books or writings relating thereto; or if he has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof; or if, within four months before the commencement of such proceedings, he has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution; or if, since the passage of this act, he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors; or if he has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate; or if, having knowledge that any person has proved such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or if, being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account; or if he, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or

obligation; or if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts; or if he has been convicted of any misdemeanor under this act, or has been guilty of any fraud whatever contrary to the true intent of this act; and before any discharge is granted, the bankrupt shall take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in this act as a ground for withholding such discharge, or as invalidating such discharge if granted.

SEC. 30. *And be it further enacted*, That no person who shall have been discharged under this act, and shall afterwards become bankrupt, on his own application shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge; but a bankrupt who shall prove to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

SEC. 31. *And be it further enacted*, That any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the district court.

SEC. 32. *And be it further enacted*, That if it shall appear to the court that the bankrupt has in all things conformed to his duty under this act, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court, in substance as follows: —

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF .

Whereas has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said be

forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the day of , on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of the court at , in the said district, this day of , A.D.

(Seal) Judge.

SEC. 33. *And be it further enacted*, That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt; and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise. And in all proceedings in bankruptcy commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of application for discharge.

SEC. 34. *And be it futher enacted*, That a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded, by a simple averment that on the day of its date such discharge was granted to him, setting the same forth in haec verba, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and [the] regularity of such discharge: *Always provided*, That any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same. Said application shall be in writing, shall specify which, in particular, of the several acts mentioned in section twenty-nine it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance, and no evidence shall be admitted as to any other of the said acts; but said application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of said application to

be given to said bankrupt, and order him to appear and answer the same, within such time as to the court shall seem fit and proper. If, upon the hearing of said parties, the court shall find that the fraudulent acts, or any of them, set forth as aforesaid by said creditor or creditors against the bankrupt, are proved, and that said creditor or creditors had no knowledge of the same until after the granting of said discharge, judgment shall be given in favor of said creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled. But if said court shall find that said fraudulent acts and all of them, set forth as aforesaid, are not proved, or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by said proceedings.

PREFERENCES AND FRAUDULENT CONVEYANCES DECLARED VOID.

SEC. 35. *And be it further enacted*, That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited ; and if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or con-

veyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud. And contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void; and if any creditor shall obtain any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, every creditor so offending shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained to be recovered by the assignee for the benefit of the estate.

BANKRUPTCY OF PARTNERSHIPS AND CORPORATIONS.

SEC. 36. *And be it further enacted*, That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted ; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners according to their respective right and interest therein,

and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts; and the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

SEC. 37. *And be it further enacted*, That the provisions of this act shall apply to all moneyed business or commercial corporations and joint stock companies, and that upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of such corporation or company, made and presented in the manner hereinafter provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors; and all the provisions of this act which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company, and the money and property thereof. All payments, conveyances, and assignments declared fraudulent and void by this act when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. No allowance or discharge shall be granted to any corporation or joint stock company, or to any person or officer or member thereof: *Provided*, That whenever any corporation by proceedings under this act shall be declared bankrupt, all its property and assets shall be distributed to the creditors of such corporation in the manner provided in this act in respect to natural persons.

OF DATES AND DEPOSITIONS.

SEC. 38. *And be it further enacted*, That the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor; upon which an order may be issued by the court, or by a register in the manner provided in sec-

tion four, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act; the proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be prima facie evidence of the facts therein stated. Evidence or examination in any of the proceedings under this act may be taken before the court, or a register in bankruptcy, viva voce or in writing, before a commissioner of the circuit court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the circuit court.

Involuntary Bankruptcy.

Sec. 39. *And be it further enacted*, That any person residing and owing debts as aforesaid, who, after the passage of this act, shall depart from the State, district, or Territory of which he is an inhabitant, with intent to defraud his creditors, or, being absent, shall, with such intent, remain absent; or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process; or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of any State, district, or Territory within which such debtor resides or has property founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of such State, district, or Territory applicable thereto, for a period of seven days; or has been actually imprisoned for more than seven days in a civil action, founded on contract, for the sum of one hundred dollars or upwards; or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any

payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or give any warrant to confess judgment; or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or who, being a banker, merchant, or trader, has fraudulently stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, or that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy.

SEC. 40. *And be it further enacted*, That upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted; and may also, by its injunctions, restrain the debtor, and any other person, in the mean time, from making any transfer or disposition of any part of the debtor's property not excepted by this act from the operation thereof and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest the alleged [bankrupt] and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until the decision of the court upon the petition or the further order of the court, and forthwith to take possession provisionally of all the property and effects of the

debtor, and safely keep the same until the further order of the court. A copy of the petition and of such order to show cause shall be served on such debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if such debtor cannot be found, or his place of residence ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appear and consent thereto, shall be had until proof shall have been given, to the satisfaction of the court, of such service or publication; and if such proof be not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published.

SEC. 41. *And be it further enacted*, That on such return day or adjourned day, if the notice has been duly served or published, or shall be waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demand in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy; and if upon such hearing or trial, the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover costs.

SEC. 42. *And be it further enacted*, That if the facts set forth in the petitition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt, and, as such, subject to the provisions of this act, and shall forthwith issue a warrant to take possession of the estate of the debtor. The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those hereinbefore provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition. The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days, not exceeding five after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule of the creditors and an inventory of his estate in the form

and verified in the manner required of a petitioning debtor by section thirteen. If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner hereinbefore provided for the service of the order to show cause; and if the bankrupt is absent or cannot be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain. If the petitioning creditor shall not appear and proceed on the return day, or adjourned day, the court may, upon the petition of any other creditor, to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

Of Superseding the Bankrupt Proceedings by Arrangement.

Sec. 43. *And be it further enacted*, That if at the first meeting of creditors, or at any meeting of creditors to be specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three fourths in value of the creditors whose claims have been proved shall determine and resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors, it shall be lawful for the creditors to certify and report such resolution to the court, and to nominate one or more trustees to take and hold and distribute the estate, under the direction of such committee. If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, it shall confirm the same; and upon the execution and filing, by or on behalf of three fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt be wound up and settled by said trustees according to the terms of such resolution, the bankrupt, or his assignee in bankruptcy, if appointed, as the case may be, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the said trustee or trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such

resolution not been passed; and such consent and the proceedings thereunder shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it; and the court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors, and the said trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors, and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy under this act; and the said trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have power to summon and examine, *or* [on] oath or otherwise, the bankrupt and any creditor, and any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers in the same manner as in other proceedings in bankruptcy under this act; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this act. If the resolution shall not be duly reported, or the consent of the creditors shall not be duly filed, or if, upon its filing, the court shall not think fit to approve thereof, the bankruptcy shall proceed as though no resolution had been passed, and the court may make all necessary orders for resuming the proceedings. And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this act.

Penalties Against Bankrupts.

Sec. 44. *And be it further enacted*, That from and after the passage of this act if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy, secrete or conceal any property belonging to his estate, or part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove, or cause to be removed, the same or any part thereof out

of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay either of them in recovering or receiving the same, or make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate with the like intent, or spend any part thereof in gaming; or shall, with intent to defraud, wilfully and fraudulently conceal from his assignee or omit from his schedule any property or effects whatsoever; or if, in case of any person having, to his knowledge or belief, proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or shall attempt to account for any of his property by fictitious losses or expenses; or shall, within three months before the commencement of proceedings in bankruptcy, under the false color and pretence of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels with intent to defraud; or shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dispose of, otherwise than by bona fide transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years.

Penalties Against Officers.

Sec. 45. *And be it further enacted*, That if any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy shall, for anything done or pretended to be done under this act, or under color of doing anything thereunder, wilfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by this act, or which shall be allowed under the authority thereof, such person, when convicted thereof shall forfeit and pay the sum of not less than three hundred dollars and not exceeding five hundred dollars, and be imprisoned not exceeding three years.

Sec. 46. *And be it further enacted*, That if any person shall forge the signature of a judge, register, or other officer of the court, or shall forge or counterfeit the seal of the courts, or knowingly con-

cur in using any such forged or counterfeit signature or seal for the purpose of authenticating any proceeding or document, or shall tender in evidence any such proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, any such person shall be guilty of felony, and upon conviction thereof shall be liable to a fine of not less than five hundred dollars, and not more than five thousand dollars, and to be imprisoned not exceeding five years, at the discretion of the court.

Fees and Costs.

Sec. 47. *And be it further enacted*, That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order, under the provisions of this act, for fees in bankruptcy, the following fees, which shall be applied to the payment for the services of the registers : —

For issuing every warrant, two dollars.

For each day in which a meeting is held, three dollars.

For each order for a dividend, three dollars.

For every order substituting an arrangement by trust deed for bankruptcy, two dollars.

For every bond with sureties, two dollars.

For every application for any meeting in any matter under this act, one dollar.

For every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

For taking depositions, the fees now allowed by law.

For every discharge when there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate, and, before a warrant issues, the petitioner shall deposit with the senior register of the court, or with the clerk, to be delivered to the register, fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued, shall pay the same, and the court may issue an execution against him to compel payment to the register.

Before any dividend is ordered, the assignee shall pay out of the estate to the messenger the following fees, and no more: —

First. For service of warrant, two dollars.

Second. For all necessary travel, at the rate of five cents a mile each way.

Third. For each written note to creditor named in the schedule, ten cents.

Fourth. For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of said expenses.

For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

The enumeration of the foregoing fees shall not prevent the judges, who shall frame general rules and orders in accordance with the provisions of section ten, from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in this section in classes of cases to be named in their rules and orders.

Of Meaning of Terms and Computation of Time.

Sec. 48. *And be it further enacted*, That the word "assignee," and the word "creditor" shall include the plural also; and the word "messenger" shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal" shall include the marshal's deputies; the word "person" shall also include "corporation"; and the word "oath" shall include "affirmation." And in all cases in which any particular number of days is prescribed by this act, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this act, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first, and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

Sec. 49. *And be it further enacted*, That all the jurisdiction, power, and authority conferred upon and vested in the District Court of the United States by this act in cases in bankruptcy are hereby conferred upon and vested in the Supreme Court of the District of Columbia, and in and upon the supreme courts of the several Territories of the United States, when the bankrupt resides in the said

District of Columbia or in either of the said Territories. And in those judicial districts which are not within any organized circuit of the United States, the power and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.

SEC. 50. *And be it further enacted*, That this act shall commence and take effect as to the appointment of the officers created hereby, and the promulgation of rules and general orders, from and after the date of its approval: *Provided*, That no petition or other proceeding under this act shall be filed, received, or commenced before the first day of June, anno Domini, eighteen hundred and sixty-seven.

Approved, March 2, 1867.

Act of July 27, 1868, c. 268, 15 Stat. 227. — *An Act in Amendment of an Act entitled "An Act to establish a uniform System of Bankruptcy throughout the United States," approved March second, eighteen hundred and sixty-seven.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of second clause of the thirty-third section of said act shall not apply to the cases of proceedings in bankrup[t]cy commenced prior to the first day of January, eighteen hundred and sixty-nine, and the time during which the operation of the provisions of said clause is postponed shall be extended until said first day of January, eighteen hundred and sixty-nine. And said clause is hereby so amended as to read as follows: In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge.

SEC. 2. *And be it further enacted*, That said act be further amended as follows: The phrase "presented or defended," in the fourteenth section of said act shall read "prosecuted or defended"; the phrase "non-resident debtors" in line five, section twenty-two, of the act as printed in the Statutes at Large, shall read "non-resident creditors"; that the word "or" in the next to the last line of the thirty-ninth section of the act shall read "and"; that the phrase "section thirteen" in the forty-second section of said act shall read

"section eleven"; and the phrase "or spends any part thereof in gaming" in the forty-fourth section of said act shall read "or shall spend any part thereof in gaming"; and that the words "with the senior register, or" and the phrase "to be delivered to the register" in the forty-seventh section of said act be stricken out.

SEC. 3. *And be it further enacted*, That registers in bankruptcy shall have power to administer oaths in all cases and in relation to all matters in which oaths may be administered by commissioners of the circuit courts of the United States, and such commissioners may take proof of debts in bankruptcy in all cases, subject to the revision of such proofs by the register and by the court according to the provisions of said act.

Approved, July 27, 1868.

Act of June 30, 1870, c. 177, 16 Stat. 173. — *An Act to amend an Act entitled "An Act to establish a uniform System of Bankruptcy throughout the United States," approved March* 2, 1867.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the jurisdiction conferred on the supreme courts of the Territories by the act to which this is in amendment may be exercised, upon petitions regularly filed in that court, by either of the justices thereof while holding the district court in the district in which the petitioner or the alleged bankrupt resides, and said several supreme courts shall have the same supervisory jurisdiction over all acts and decisions of each justice thereof as is conferred upon the circuit courts of the United States over proceedings in the district courts of the United States by the second section of said act.

SEC. 2. *And be it further enacted*, That in case of a vacancy in the office of district judge in any district, or in case any district judge shall, from sickness, absence, or other disability, be unable to act, the circuit judge of the circuit in which such district is included may make, during such disability or vacancy, all necessary rules and orders preparatory to the final hearing of all causes in bankruptcy, and cause the same to be entered or issued, as the case may require, by the clerk of the district court.

Approved, June 30, 1870.

Act of July 14, 1870, c. 262, 16 Stat. 276. — *An Act in amendment of an Act entitled "An Act establishing an uniform System of Bankruptcy throughout the United States."*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the second clause of the thirty-third section of said act, as amended by the first section of an act in amendment thereof, approved July twenty-seven, eighteen hundred and sixty-eight, shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, eighteen hundred and sixty-nine.

SEC. 2. *And be it further enacted*, That the clause in the thirty-ninth section of said act which now reads "or who, being a banker, merchant, or trader, has fraudulently stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," shall be amended so as to read as follows: "or who, being a banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days."

Approved, July 14, 1870.

Act of June 8, 1872, c. 339, 17 Stat. 334. — *An Act to amend an Act entitled "An Act to establish a Uniform System of Bankruptcy throughout the United States."*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first proviso in section fourteen of an act approved March second, eighteen hundred and sixty-seven, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," be amended by striking out the words "eighteen hundred and sixty-four," and inserting in lieu thereof "eighteen hundred and seventy-one."

Approved, June 8, 1872.

Act of June 8, 1872, c. 340, 17 Stat. 334. — *An Act to declare the true Intent and Meaning of Section Two of an Act entitled "An Act to establish a Uniform System of Bankruptcy throughout the United States," approved March two, eighteen hundred and sixty-seven.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the powers and jurisdiction granted to the several circuit courts of the United States, or any justice thereof, by section two of an act entitled "An Act to establish a uniform system of bankruptcy throughout the

United States," approved March second, eighteen hundred and sixty-seven, may be exercised in any district in which the powers or jurisdiction of a circuit court have been or may be conferred on the district court for such district, as if no such powers or jurisdiction had been conferred on such district court; it being the true intent and meaning of said act that the system of bankruptcy thereby established shall be uniform throughout the United States.

Approved, June 8, 1872.

Act of February 13, 1873, c. 135, 17 Stat. 436. — *An Act to amend an Act entitled "An Act to establish a uniform System of Bankruptcy throughout the United States," approved March second, eighteen hundred and sixty-seven.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That whenever a corporation created by the laws of any State, whose business is carried on wholly within the State creating the same, and also any insurance company so created, whether all its business shall be carried on in such State or not, has had proceedings duly commenced against such corporation or company before the courts of such State for the purpose of winding up the affairs of such corporation or company and dividing its assets ratably among its creditors and lawfully among those entitled thereto prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made, by such court agreeably to the State law for the ratable distribution or payment of any dividend of assets to the creditors of such corporation or company while such State court shall remain actually or constructively in possession or control of the assets of such corporation or company shall be deemed valid notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.

Approved, February 13, 1873.

Act of March 3, 1873, c. 235, 17 Stat. 577. — *An Act to declare the true Intent and Meaning of the Act approved June eight, eighteen hundred and seventy-two, amendatory of the General Bankrupt Laws.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That it was the

true intent and meaning of an act approved June eighth, eighteen hundred and seventy-two, entitled "An Act to amend an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March second, eighteen hundred and sixty-seven," that the exemptions allowed the bankrupt by the said amendatory act should, and it is hereby enacted that they shall, be the amount allowed by the constitution and laws of each State, respectively, as existing in the year eighteen hundred and seventy-one; and that such exemptions be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding.

Approved, March 3, 1873.

ACT OF 1874.

Act of June 22, 1874, 18 Stat. 178. — *An Act to amend and supplement an act entitled "An act to establish a uniform system of Bankruptcy throughout the United States," approved March second, eighteen hundred and sixty-seven, and for other purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March second, eighteen hundred and sixty-seven, be, and the same is hereby, amended and supplemented as follows: That the court may, in its discretion, on sufficient cause shown, and upon notice and hearing, direct the receiver or assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when, in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor shall have been declared a bankrupt: *Provided,* That such order shall not be made until the court shall be satisfied that it is approved by a majority in value of the creditors.

SEC. 2. That section one of said act be, and it is hereby, amended by adding thereto the following words: "*Provided,* That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from

equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides having jurisdiction of claims of such nature and amount."

SEC. 3. That section two of said act be, and it hereby is, amended by striking out, in line ten, the words "the same," and inserting the word "any"; and by adding next after the words "adverse interest," in line twelve, the words "or owing any debt to such bankrupt."

SEC. 4. That unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels and at such times and places as shall be best calculated to produce the greatest amount with the least expense. All notices of public sales under this act by any assignee or officer of the court shall be published once a week for three consecutive weeks in the newspaper or newspapers, to be designated by the judge, which, in his opinion, shall be best calculated to give general notice of the sale. And the court, on the application of any party in interest, shall have complete supervisory power over such sales, including the power to set aside the same and to order a re-sale, so that the property sold shall realize the largest sum. And the court may, in its discretion, order any real estate of the bankrupt, or any part thereof, to be sold for one-fourth cash at the time of sale, and the residue within eighteen months in such instalments as the court may direct, bearing interest at the rate of seven per centum per annum, and secured by proper mortgage or lien upon the property so sold. And it shall be the duty of every assignee to keep a regular account of all moneys received or expended by him as such assignee, to which account every creditor shall, at reasonable times, have free access. If any assignee shall fail or neglect to well and faithfully discharge his duties in the sale or disposition of property as above contemplated, it shall be the duty of the court to remove such assignee, and he shall forfeit all fees and emoluments to which he might be entitled in connection with such sale. And if any assignee shall, in any manner, in violation of his duty aforesaid, unfairly or wrongfully sell or dispose of, or in any manner fraudulently or corruptly combine, conspire, or agree with any person or persons, with intent to unfairly or wrongfully sell or dispose of the property committed to his charge, he shall, upon proof thereof, be removed, and forfeit all fees or other compensation for any and all services in connection with such bankrupt's estate, and, upon conviction thereof before any court of competent jurisdiction, shall be liable to a fine of not more than ten thousand dollars, or imprisonment in the penitentiary for

a term of not exceeding two years, or both fine and imprisonment, at the discretion of the court. And any person so combining, conspiring, or agreeing with such assignee for the purpose aforesaid shall, upon conviction, be liable to a like punishment. That the assignee shall report, under oath, to the court, at least as often as once in three months, the condition of the estate in his charge, and the state of his accounts in detail, and at all other times when the court, on motion or otherwise, shall so order. And on any settlement of the accounts of any assignee, he shall be required to account for all interest, benefit, or advantage received, or in any manner agreed to be received, directly or indirectly, from the use, disposal, or proceeds of the bankrupt's estate. And he shall be required, upon such settlement, to make and file in court an affidavit declaring, according to the truth, whether he has or has not, as the case may be, received, or is or is not, as the case may be, to receive, directly or indirectly, any interest, benefit, or advantage from the use or deposit of such funds; and such assignee may be examined orally upon the same subject, and if he shall wilfully swear falsely, either in such affidavit or examination, or to his report provided for in this section, he shall be deemed to be guilty of perjury, and, on conviction thereof, be punished by imprisonment in the penitentiary not less than one and not more than five years.

SEC. 5. That section eleven of said act be amended by striking out the words "as the warrant specifies," where they first occur, and inserting the words "as the marshal shall select, not exceeding two"; and inserting after the word "specifies" where it last occurs the words "But whenever the creditors of the bankrupt are so numerous as to make any notice now required by law to them, by mail or otherwise, a great and disproportionate expense to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication in a newspaper or newspapers, to all such creditors whose claims, as reported, do not exceed the sums, respectively, of fifty dollars."

SEC. 6. That the first clause of section twenty of said act be amended by adding, at the end thereof, the words "or in cases of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off."

SEC. 7. That section twenty-one of said act be amended by inserting the following words in line six, immediately after "thereby": "But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a dis-

charge has been refused or the proceedings have been determined without a discharge."

SEC. 8. That the following words shall be added to section twenty-six of said act: "That in all causes and trials arising or ordered under this act, the alleged bankrupt, and any party thereto, shall be a competent witness."

SEC. 9. That in cases of compulsory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value; and the provision in section thirty-three of said act of March second, eighteen hundred and sixty-seven, requiring fifty per centum of such assets, is hereby repealed.

SEC. 10. That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section thirty-five of the act to which this is an amendment is hereby changed to two months; but this provision shall not take effect until two months after the passage of this act. And in the cases aforesaid, the period of six months mentioned in said section thirty-five is hereby changed to three months; but this provision shall not take effect until three months after the passage of this act.

SEC. 11. That section thirty-five of said act be, and the same is hereby, amended as follows:

First. After the word "and" in line eleven, insert the word "knowing."

Secondly. After the word "attachment," in the same line, insert the words "sequestration, seizure."

Thirdly. After the word "and," in line twenty, insert the word "knowing." And nothing in said section thirty-five shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan.

SEC. 12. That section thirty-nine of said act of March second,

eighteen hundred and sixty-seven, be amended so as to read as follows:

"SEC. 39. That any person residing, and owing debts, as aforesaid, who, after the passage of this act, shall depart from the State, District, or Territory of which he is an inhabitant, with intent to defraud his creditors; or, being absent, shall, with such intent, remain absent; or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process; or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of the United States or of any State, District, or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of the United States or of such State, District, or Territory, applicable thereto, for a period of twenty days, or has been actually imprisoned for more than twenty days in a civil action founded on contract for the sum of one hundred dollars or upward; or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or who being a bank, banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended and not resumed payment, within a period of forty days, of his commercial paper, (made or passed in the course of his business as such), or who, being a bank or banker, shall fail for forty days to pay any depositor upon demand of payment lawfully made, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his

creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable: *Provided:* That such petition is brought within six months after such act of bankruptcy shall have been committed. And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith,) shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and, in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned, or transferred contrary to this act: *Provided,* That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy. And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers

thereof, if so many there be. And if any of said first five signers shall not resign in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers. And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purposes aforesaid."

SEC. 13. That section forty of said act be amended by adding at the end thereof the following words: "And if, on the return-day of the order to show cause as aforesaid, the court shall be satisfied that the requirement of section thirty-nine of said act as to the number and amount of petitioning creditors has been complied with, or if, within the time provided for in section thirty-nine of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors and one-third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereafter commenced, with costs."

SEC. 14. That section forty-one of said act be amended as follows: After the word "bankruptcy," in line eight, strike out all of said section, and insert the words, "Or, at the election of the debtor, the court may, in its discretion, award a venire facias to the marshal of the district, returnable within ten days before him for the trial of the facts set forth in the petition, at which time the trial shall be had, unless adjourned for cause. And unless, upon such hearing or trial, it shall appear to the satisfaction of said court, or of the jury, as the case may be, that the facts set forth in said petition are true, or if it shall appear that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceeding shall be dismissed, and the respondent shall recover costs; and all proceedings in bankruptcy may be discontinued on reasonable notice and hearing, with the approval of the court, and upon the assent, in writing, of such debtor, and not less than one-half of his creditors in number and amount; or, in case all the creditors and such debtor assent thereto, such discontinuance shall be ordered and entered; and all parties shall be remitted, in either case, to the same rights and duties existing at the date of the filing

of the petition for bankruptcy, except so far as such estate shall have been already administered and disposed of. And the court shall have power to make all needful orders and decrees to carry the foregoing provision into effect."

SEC. 15. That section eleven of said act be amended by inserting the words "and valuation" after the word "inventory" in the twenty-first line; and that section forty-two of said act be amended by inserting the words "and valuation" after the word "inventory" in the fifteenth line.

SEC. 16. That section forty-nine of said act be amended by striking out after the word "the," in line five, the words "supreme courts," and inserting in lieu thereof "district courts," and in line six, after the word "States," inserting the words "subject to the general superintendence and jurisdiction conferred upon circuit courts by section two of said act."

COMPOSITION WITH CREDITORS.

SEC. 17. That the following provisions be added to section forty-three of said act: That in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. And in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors whose debts are fully secured shall not be entitled to vote upon or to sign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by resolution passed in the manner and under the circumstances aforesaid, add to, or vary the provisions of, any composition previously accepted by them, without predjudice to any persons taking interests under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner and proceeded with in the same way and with the same consequences as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the crediters whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertently by a debtor in the statement of

his debts may be corrected upon reasonable notice, and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a pro-rata payment or satisfaction, in money, to the creditors of such debtor in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case, be computed in calculating periods of time prescribed by said act.

SEC. 18. That from and after the passage of this act the fees, commissions, charges, and allowances, excepting actual and necessary disbursements, of, and to be made by the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy, shall be reduced to one-half of the fees, commissions, charges, and allowances heretofore provided for or made in like cases: *Provided*, That the preceding provision shall be and remain in force until the justices of the Supreme Court of the United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them by sections ten and forty-seven of said act, and no longer, which duties they shall perform as soon as may be. And said justices shall have power under said sections, by general regulations, to simplify and, so far as in their judgment will conduce to the benefit of creditors, to consolidate the duties of the register, assignee, marshal, and clerk, and to reduce fees, costs, and charges, to the end that prolixity, delay, and unnecessary expense may be avoided. And no register or clerk of court, or any partner or

clerk of such register or clerk of court, or any person having any interest with either in any fees or emoluments in bankruptcy, or with whom such register or clerk of court shall have any interest in respect to any matter in bankruptcy, shall be of counsel, solicitor, or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, or in an appeal therefrom. Nor shall they, or either of them, be executor, administrator, guardian, commissioner, appraiser, divider, or assignee, of or upon any estate within the jurisdiction of either of said courts of bankruptcy; nor be interested, directly or indirectly, in the fees or emoluments arising from either of said trusts. And the words "except such as are established by this act or by law," in section ten of said act, are hereby repealed.

SEC. 19. That it shall be the duty of the marshal of each district, in the month of July of each year, to report to the clerk of the district court of such district, in a tabular form, to be prescribed by the justices of the Supreme Court of the United States, as well as such other or further information as may be required by said justices.

First, the number of cases in bankruptcy in which the warrant prescribed in section eleven of said act has come to his hands during the year ending June thirtieth, preceding;

Secondly, how many such warrants were returned, with the fees, costs, expenses, and emoluments thereof, respectively and separately;

Thirdly, the total amount of all other fees, costs, expenses, and emoluments, respectively and separately, earned or received by him during such year from or in respect of any matter in bankruptcy;

Fourthly, a summarized statement of such fees, costs, and emoluments, exclusive of actual disbursements in bankruptcy, received or earned for such year;

Fifthly, a summarized statement of all actual disbursements in such cases for such year.

And in like manner, every register shall, in the same month and for the same year, make a report to such clerk of,

First, the number of voluntary cases in bankruptcy coming before him during said year;

Secondly, the amount of assets and liabilities, as nearly as may be, of the bankrupts;

Thirdly, the amount and rate per centum of all dividends declared;

Fourthly, the disposition of all such cases;

Fifthly, the number of compulsory cases in bankruptcy coming before him, in the same way;

Sixthly, the amount of assets and liabilities, as nearly as may be, of such bankrupt;

Seventhly, the disposition of all such cases;

Eighthly, the amounts and rate per centum of all dividends declared in such cases;

Ninthly, the total amount of fees, charges, costs, and emoluments of every sort, received or earned by such register during said year in each class of cases above stated;

And in like manner, every assignee shall, during said month, make like return to such clerk of,

First, the number of voluntary and compulsory cases, respectively and separately, in his charge during said year;

Secondly, the amount of assets and liabilities therein, respectively and separately;

Thirdly, the total receipts and disbursements therein, respectively and separately;

Fourthly, the amount of dividends paid or declared, and the rate per centum thereof, in each class, respectively and separately;

Fifthly, the total amount of all his fees, charges, and emoluments, of every kind therein, earned or received;

Sixthly, the total amount of expenses incurred by him for legal proceedings and counsel fees;

Seventhly, the disposition of the cases respectively;

Eighthly, a summarized statement of both classes as aforesaid.

And in like manner, the clerk of said court, in the month of August in each year, shall make up a statement for such year, ending June thirtieth, of,

First, all cases in bankruptcy pending at the beginning of said year;

Secondly, all of such cases disposed of;

Thirdly, all dividends declared therein;

Fourthly, the number of reports made from each assignee therein;

Fifthly, the disposition of all such cases;

Sixthly, the number of assignees' accounts filed and settled;

Seventhly, whether any marshal, register, or assignee has failed to make and file with such clerk the reports by this act required, and, if any have failed to make such reports, their respective names and residences.

And such clerk shall report in respect of all cases begun during said year.

And he shall make a classified statement, in tabular form, of all his fees, charges, costs, and emoluments, respectively, earned or accrued

during said year, giving each head under which the same accrued, and also the sum of all moneys paid into and disbursed out of court in bankruptcy, and the balance in hand or on deposit.

And all the statements and reports herein required shall be under oath, and signed by the persons respectively making the same.

And said clerk shall, in said month of August, transmit every such statement and report so filed with him, together with his own statement and report aforesaid, to the Attorney-General of the United States.

Any person who shall violate the provisions of this section shall, on motion made, under the direction of the Attorney-General, be by the district court dismissed from his office, and shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding one year.

SEC. 20. That in addition to the officers now authorized to take proof of debts against the estate of a bankrupt, notaries public are hereby authorized to take such proof, in the manner and under the regulations provided by law; such proof to be certified by the notary and attested by his signature and official seal.

SEC. 21. That all acts and parts of acts inconsistent with the provisions of this act be, and the same are hereby, repealed.

Approved June 22, 1874.

Act of April 14, 1876, c. 62, 19 Stat. 33. — *An act concerning cases in bankruptcy commenced in the supreme courts of the several Territories prior to the twenty-second day of June, eighteen hundred and seventy-four, and now undetermined therein.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases in bankruptcy commenced in the supreme courts of any of the Territories of the United States prior to the twenty-second day of June, Anno Domini eighteen hundred and seventy-four, and now undetermined therein, the clerks of the said several courts shall immediately transmit to the clerks of the district courts of the several districts of said Territories all the papers in, and a certified transcript of, all the proceedings had in each of said cases; and the said clerks of the district courts shall immediately file the said papers and transcripts as papers and transcripts in the said district courts.

SEC. 2. That the clerks of the said several supreme courts shall transmit the papers and transcripts provided for in section one of this

act, in each case, to the clerk of the district court of the district wherein the bankrupt or bankrupts, or some one of them, resided at the time of the filing of the petition in bankruptcy in said case; and as soon as the said papers and transcript in any case shall have been transmitted and filed, as herein provided, the district court in which the same shall have been so filed shall have jurisdiction of the said case, to hear and determine all questions arising therein, and to finally adjudicate and determine the same in all respects as contemplated in other bankruptcy cases by the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," and approved March second, eighteen hundred and sixty-seven, and amendments thereto.

Approved, April 14, 1876.

Act of July 26, 1876, c. 234, 19 Stat. 102. — *An act to amend the act entitled "An act to amend and supplement an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March second, eighteen hundred and sixty-seven, and for other purposes," approved June twenty-second, eighteen hundred and seventy-four.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twelve of said act be, and the same is hereby, amended as follows: After the word "committed," in line forty-four, insert: "*Provided also*, That no voluntary assignment by a debtor or debtors of all his or their property, heretofore or hereafter made in good faith for the benefit of all his or their creditors, ratably and without creating any preference, and valid according to the law of the State where made, shall of itself, in the event of his or their being subsequently adjudicated bankrupts in a proceeding of involuntary bankruptcy, be a bar to the discharge of such debtor or debtors." That section fifty-one hundred and eight of the Revised Statutes is hereby amended so as to read as follows: At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may apply to the court for a discharge from his debts. This section shall apply in all cases heretofore or hereafter commenced.

Approved, July 26, 1876.

Act of June 7, 1878, c. 160, 20 Stat. 99. — *An act to repeal the bankrupt law.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the bankrupt law approved March second, eighteen hundred and sixty-seven, title sixty-one, Revised Statutes, and an act entitled "An act to amend and supplement an act entitled An act to establish a uniform system of bankruptcy throughout the United States, approved March second, eighteen hundred and sixty-seven, and for other purposes, approved June twenty-second, eighteen hundred and seventy-four," and all acts in amendment or supplementary thereto or in explanation thereof, be, and the same are hereby, repealed: *Provided, however*, That such repeal shall in no manner invalidate or affect any case in bankruptcy instituted and pending in any court prior to the day when this act shall take effect; but as to all such pending cases and all future proceedings therein, and in respect of all pains, penalties, and forfeitures which shall have been incurred under any of said acts prior to the day when this act takes effect, or which may be thereafter incurred, under any of those provisions of any of said acts which, for the purposes named in this act, are kept in force, and all penal actions and criminal proceedings for a violation of any of said acts, whether then pending or thereafter instituted, and in respect of all rights of debtors and creditors (except the right of commencing original proceedings in bankruptcy), and all rights of, and suits by, or against assignees, under any, or all of said acts, in any matter or case which shall have arisen prior to the day when this act takes effect (which shall be on the first day of September, anno Domini eighteen hundred and seventy-eight), or in any matter or case which shall arise after this act takes effect, in respect of any matter of bankruptcy authorized by this act to be proceeded with after said last-named day, the acts hereby repealed shall continue in full force and effect until the same shall be fully disposed of, in the same manner as if said acts had not been repealed.

Approved, June 7, 1878.

APPENDIX II.

GENERAL ORDERS AND FORMS IN BANKRUPTCY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

I.

DOCKET.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the

proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

II.

FILING OF PAPERS.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

III.

PROCESS.

All process, summons and subpœnas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

IV.

CONDUCT OF PROCEEDINGS.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court. The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

V.

FRAME OF PETITIONS.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

VI.

PETITIONS IN DIFFERENT DISTRICTS.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

VII.

PRIORITY OF PETITIONS.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either peti-

tion, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

VIII.

PROCEEDINGS IN PARTNERSHIP CASES.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defences which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

IX.

SCHEDULE IN INVOLUNTARY BANKRUPTCY.

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

X.

INDEMNITY FOR EXPENSES.

Before incurring any expense in publishing or mailing notices, or in travelling, or in procuring the attendance of witnesses, or in per-

petuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

XI.

AMENDMENTS.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

XII.

DUTIES OF REFEREE.

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

XIII.

APPOINTMENT AND REMOVAL OF TRUSTEE.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removeable by the judge only.

XIV.

NO OFFICIAL OR GENERAL TRUSTEE.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

XV.

TRUSTEE NOT APPOINTED IN CERTAIN CASES.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

XVI.

NOTICE TO TRUSTEE OF HIS APPOINTMENT.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

XVII.

DUTIES OF TRUSTEE.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall

certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

XVIII.

SALE OF PROPERTY.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

XIX.

ACCOUNTS OF MARSHAL.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

XX.

PAPERS FILED AFTER REFERENCE.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

XXI.

PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the

original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

XXII.

TAKING OF TESTIMONY.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with

his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

XXIII.

ORDERS OF REFEREE.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

XXIV.

TRANSMISSION OF PROVED CLAIMS TO CLERK.

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

XXV.

SPECIAL MEETING OF CREDITORS.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

XXVI.

ACCOUNTS OF REFEREE.

Every referee shall keep an accurate account of his travelling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

XXVII.

REVIEW BY JUDGE.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

XXVIII.

REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

XXIX.

PAYMENT OF MONEYS DEPOSITED.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

XXX.

IMPRISONED DEBTOR.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of

his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

XXXI.

PETITION FOR DISCHARGE.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

XXXII.

OPPOSITION TO DISCHARGE OR COMPOSITION.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

XXXIII.

ARBITRATION.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

XXXIV.

COSTS IN CONTESTED ADJUDICATIONS.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

XXXV.

COMPENSATION OF CLERKS, REFEREES AND TRUSTEES.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in travelling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.

XXXVI.

APPEALS.

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a Territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

XXXVII.

GENERAL PROVISIONS.

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

XXXVIII.

FORMS.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

FORMS IN BANKRUPTCY.

[N. B. — Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankrupt Act of 1898, c. 4, § 20.]

[Form No. 1.]

Debtor's Petition.

To the Honorable ———, ———,
Judge of the District Court of the United States
for the —— District of ——— :

The petition of ——— ———, of ———, in the county of ———, and district and State of ———, ——— [*state occupation*], respectfully represents:

That he has had his principal place of business [*or* has resided, *or* has had his domicile] for the greater portion of six months next immediately preceding the filing of this petition at ———, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——— ———.

——— ———, *Attorney.*

United States of America, District of ———, ss:

I, ——— ———, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

——— ———, *Petitioner.*

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,

——— ———.

(*Official character*).

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	Where and when contracted.	Nature and consideration of the debt, and whether contracted as partner or joint contractor; and if so, with whom.	Amount.	
						$	c.
(1.) Taxes and debts due and owing to the United States.							
(2.) Taxes due and owing to the State of ——, or to any county, district, or municipality thereof.							
(3.) Wages due workmen, clerks, or servants, to an amount not exceeding $300 each, earned within three months before filing the petition.							
(4.) Other debts having priority by law.							
					Total		

—— ——, *Petitioner.*

SCHEDULE A. (2)

Creditors holding securities.

[N. B. — Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by acts of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.]

Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	Description of securities.	When and where debts were contracted.	Value of securities.		Amount of debts.	
					$	c.	$	c.
				Total . . .				

——— ———, *Petitioner.*

SCHEDULE A. (3)

Creditors whose claims are unsecured.

[N. B. — When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated.)	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person: and, if so, with whom.	Amount.	
					$	c.
				Total		

——— ———, *Petitioner.*

SCHEDULE A. (4)

Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or indorsers.

[N. B. — The dates of the notes or bills, and when due, with the the names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.]

Reference to ledger or voucher.	Names of holders as far as known.	Residence (if unknown, that fact must be stated).	Place where contracted.	Nature of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount. $	Amount. c.
				Total		

——— ———, *Petitioner.*

SCHEDULE A. (5)

Accommodation paper.

[N. B. — The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if unknown, that fact must be stated).	Names and residence of persons accommodated.	Place where contracted.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.	
						$	c.
					Total		

——— ———, *Petitioner.*

OATH TO SCHEDULE A.

United States of America, District of ——— ss:

On this —— day of ———, A. D. 18—, before me personally came ——— ———, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,

[*Official character.*]

SCHEDULE B. — STATEMENT OF ALL PROPERTY OF BANKRUPT.

SCHEDULE B. (1)

Real estate.

Location and description of all real estate owned by debtor, or held by him.	Incumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value.	
			$	c
		Total		

——— ———, *Petitioner.*

SCHEDULE B. (2)

Personal property.

	$	c.
a. — Cash on hand		
b. — Bills of exchange, promissory notes, or securities of any description (each to be set out separately)		
c. — Stock in trade, in — business of —— ——, at ——, of the value of ——		
d. — Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.		
e. — Books, prints, and pictures, viz.		
f. — Horses, cows, sheep, and other animals (with number of each), viz.		
g. — Carriages and other vehicles, viz.		
h. — Farming stock and implements of husbandry, viz.		
i. — Shipping, and shares in vessels, viz.		
k. — Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.		
l. — Patents, copyrights, and trade-marks, viz.		
m. — Goods or personal property of any other description, with the place where each is situated, viz.		
Total		

—— ——, *Petitioner.*

SCHEDULE B. (3)

Choses in action.

		Dollars.	Cents.
a. — Debts due petitioner on open account			
b. — Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds			
c. — Policies of insurance			
d. — Unliquidated claims of every nature, with their estimated value			
e. — Deposits of money in banking institutions and elsewhere			
	Total		

——— ———, *Petitioner.*

SCHEDULE B. (4)

Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge.

[N. B. — A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General interest.	Particular description.	Supposed value of my interest.	
		$	c.
Interest in land			
Personal property			
Property in money, stock, shares, bonds, annuities, etc.			
Rights and powers, legacies and bequests			
	Total		

Property heretofore conveyed for benefit of creditors.		Amount realized from proceeds of property conveyed.	
		$	c.
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor			
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy			
	Total		

——— ———, *Petitioner.*

SCHEDULE B. (5)

A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

	Valuation.	
	$	c.
Military uniform, arms and equipments		
Property claimed to be exempted by state laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption		
Total		

——— ———, *Petitioner.*

SCHEDULE B. (6)

Books, papers, deeds, and writings relating to bankrupt's business and estate.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.	
Deeds.	
Papers.	

——— ———, *Petitioner.*

OATH TO SCHEDULE B.

United States of America, District of ———, ss:

On this —— day of ———, A. D. 18—, before me personally came ——— ———, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

——— ———,

——— ———,

[*Official character.*]

SUMMARY OF DEBTS AND ASSETS.

[From the statements of the bankrupt in Schedules A and B.]

Schedule A. . .	1 (1)	Taxes and debts due United States			
" " . .	1 (2)	Taxes due States, counties, districts, and municipalities			
" " . .	1 (3)	Wages			
" " . .	1 (4)	Other debts preferred by law			
Schedule A. . .	2	Secured claims			
Schedule A. . .	3	Unsecured claims			
Schedule A. . .	4	Notes and bills which ought to be paid by other parties thereto			
Schedule A. . .	5	Accommodation paper			
		Schedule A, total			
Schedule B. . .	1	Real estate			
Schedule B. . .	2-a	Cash on hand			
" " . .	2-b	Bills, promissory notes, and securities			
" " . .	2-c	Stock in trade			
" " . .	2-d	Household goods, etc.			
" " . .	2-e	Books, prints, and pictures			
" " . .	2-f	Horses, cows, and other animals			
" " . .	2-g	Carriages and other vehicles			
" " . .	2-h	Farming stock and implements			
" " . .	2-i	Shipping and shares in vessels			
" " . .	2-k	Machinery, tools, etc.			
" " . .	2-l	Patents, copyrights, and trade-marks			
" " . .	2-m	Other personal property			
Schedule B. . .	3-a	Debts due on open accounts			
" " . .	3-b	Stocks, negotiable bonds, etc.			
" " . .	3-c	Policies of insurance			
" " . .	3-d	Unliquidated claims			
" " . .	3-e	Deposits of money in banks and elsewhere . . .			
Schedule B. . .	4	Property in reversion, remainder, trust, etc. . .			
Schedule B. . .	5	Property claimed to be excepted			
Schedule B. . .	6	Books, deeds, and papers			
		Schedule B, total			

[FORM NO. 2.]

PARTNERSHIP PETITION.

To the Honorable ——— ———,
Judge of the District Court of the United States
for the —— District of ———:

The petition of ——— ——— respectfully represents:

That your petitioners and ——— ——— have been partners under the firm name of ——— ———, having their principal place of business at ———, in the county of ———, and district and State of ———, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by —— oath , contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by —— oath , contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of

said acts, and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

——— ———,
——— ———,
——— ———,
Petitioners.

——— ———, *Attorney* .

——— ———, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

——— ———,
——— ———,
——— ———,
Petitioners.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
[*Official character.*]
——— ———.

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[FORM No. 3.]

CREDITOR'S PETITION.

To the Honorable ——— ———, judge of the District Court of the United States for the —— district of ——— :

The petition of ——— ———, of ———, and ——— ———, of ———, and ——— ———, of ———, respectfully shows:

That ——— ———, of ———, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business [*or* resided, *or* had his domicile] at ———, in the county of ——— and State and district aforesaid, and owes debts to the amount of $1,000.

That your petitioners are creditors of said ——— ———, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500. That the nature and amount of your petitioners' claims are as follows:

———

———

And your petitioners further represent that said ——— ——— is insolvent, and that within four months next preceding the date of this petition the said ——— ——— committed an act of bankruptcy, in that he did heretofore, to wit, on the ——— day of ———

———

———

Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon ——— ———, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——— ———,
——— ———,
——— ———,
Petitioners.

——— ———, *Attorney.*

United States of America, District of ———, ss:

——— ———, ——— ———, ——— ———, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me, ——— ———, this ——— day of ———, 189—.

——— ———,

———.

(*Official character.*)

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[FORM No. 4.]

ORDER TO SHOW CAUSE UPON CREDITOR'S PETITION.

In the District Court of the United States for the ——— District of ———.

In the matter of ————	In Bankruptcy.

Upon consideration of the petition of ——— ——— that ——— ——— be declared a bankrupt, it is ordered that the said ——— ——— do appear at this court, as a court of bankruptcy, to be holden at ———, in the district aforesaid, on the ——— day of ———, at — o'clock in the ———noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpœna, be served on said ——— ———, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the ——— day of ———, A. D. 18—.

——— ———,

{Seal of the court.} *Clerk.*

[FORM No. 5.]

SUBPŒNA TO ALLEGED BANKRUPT.

United States of America, —— District of ———.

To ——— ———, in said district, greeting:

For certain causes offered before the District Court of the United States of America within and for the —— district of ———, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at ———, in said district, on the —— day of ———, A. D. 189—, ——— ——— to answer to a petition filed by ——— ——— in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, this —— day of ———, A. D. 189—.

——— ———,

{Seal of the court.} *Clerk.*

[FORM No. 6.]

DENIAL OF BANKRUPTCY.

In the District Court of the United States for the ——— District of ———.

In the matter of ———	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—.

And now the said ——— ——— appears, and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [*or* he demands that the same may be inquired of by a jury].

——— ———

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,

[*Official character.*]

[FORM No. 7.]

ORDER FOR JURY TRIAL.

In the District Court of the United States for the ——— District of ———.

In the matter of ———	In Bankruptcy.

At ———, in said district, on the —— day of ———, 18—.

Upon the demand in writing filed by ——— ———, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency, may be inquired of by a jury, it is ordered, that said issue be submitted to a jury.

——— ———,

{Seal of the court.} *Clerk.*

[FORM No. 8.]

SPECIAL WARRANT TO MARSHAL.

In the District Court of the United States for the —— District of ———.

In the matter of ———	In Bankruptcy.

To the marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the —— day of ———, A. D. 18—, filed against ——— ———, of the county of ——— and State of ———, in said district, and said petition is still pending; and whereas it satisfactorily appears that said ——— has committed an act of bankruptcy [*or* has neglected *or* is neglecting, *or* is about to so neglect his property that it has thereby deteriorated *or* is thereby deteriorating *or* is about thereby to

deteriorate in value], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said ——— ———, and of all his deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— of ———, A. D. 189—.

——— ———,
Clerk.

{ Seal of the court. }

RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named ——— ———, and of all his deeds, books of account, and papers which have come to my knowledge.

——— ———,
Marshal [or *Deputy Marshal*].

Fees and expenses.

1. Service of warrant		
2. Necessary travel, at the rate of six cents a mile each way		
3. Actual expenses in custody of property and other services as follows .		
[Here state the particulars.]		
	———	———

——— ———,
Marshal [or *Deputy Marshal*].

District of ———, A. D. 18—.

Personally appeared before me the said ——— ———, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

——— ———,
Referee in Bankruptcy.

[FORM No. 9.]

BOND OF PETITIONING CREDITOR.

Know all men by these presents: That we, ——— ———, as principal, and ——— ———, as sureties, are held and firmly bound unto ——— ———, in the full and just sum of ——— dollars, to be paid to the said ——— ———, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ———, A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the —— district of ——— against the said ———, and the said ——— has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said ——— ———, subject to the further orders of said District court.

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said ——— ——— shall indemnify the said ——— ——— for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in
presence of— ——— ——— [SEAL.]
——— ——— ——— ——— [SEAL.]
——— ——— ——— ——— [SEAL.]

Approved this —— day of ———, A. D. 189—.

——— ———,
District Judge.

[FORM No. 10.]

BOND TO MARSHAL.

Know all men by these presents: That we, ——— ———, as principal, and ——— ———, as sureties, are held and firmly bound unto ——— ———, marshal of the United States for the ——— district of ———, in the full and just sum of ——— dollars, to be paid to the said ——— ———, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ———, A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the ——— district of ———, against the said ——— ———, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said ——— ———, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said district court upon a petition of said ——— ——— has ordered the said property to be released to him.

Now, therefore, if the said property shall be released accordingly to the said ——— ———, and the said ——— ———, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the
presence of— ——— ——— [SEAL.]
——— ——— ——— ——— [SEAL.]
——— ——— ——— ——— [SEAL.]

Approved this ——— day of ———, of A. D. 189—.

———,
District Judge.

[FORM No. 11.]

ADJUDICATION THAT DEBTOR IS NOT BANKRUPT.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
} In Bankruptcy.

At ———, in said district, on —— day ———, A. D. 18—, before the Honorable ——— ———, judge of the —— district of ———.

This cause came on to be heard at ———, in said court, upon the petition of ——— that ——— be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [*Here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had.*]

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said ——— was not a bankrupt, and that said petition be dismissed, with costs.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 18—.

——— ———,
Clerk.

{Seal of the court.}

[FORM No. 12.]

ADJUDICATION OF BANKRUPTCY.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before the Honorable ——— ———, judge of said court in bankruptcy, the petition of ——— ——— that ——— ——— be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said ——— ——— is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 18—.

{Seal of the court.}

——— ———,
Clerk.

[FORM No. 13.]

APPOINTMENT, OATH AND REPORT OF APPRAISERS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

It is ordered that ——— ———, of ———, ——— ——— of ———, and ——— ———, of ———, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real

and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this ——— of ———, A. D. 18—.

———— ————,

Referee in Bankruptcy.

—— District of ———, ss:

Personally appeared the within-named ——— ——— and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

———— ————.

———— ————.

———— ————.

Subscribed and sworn to before me this —— day of ———, A. D. 189—.

———— ————,

[*Official character.*]

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

	Dollars.	Cents.

In witness whereof we hereunto set our hands, at ———, this —— day of ———, A. D. 18—.

———— ————.

———— ————.

———— ————.

[FORM No. 14.]

ORDER OF REFERENCE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Whereas ——— ———, of ———, in the county of ——— and district aforesaid, on the —— day of ———, A. D. 18—, was duly adjudged a bankrupt upon a petition filed in this court by [*or* against] him on the —— day of ———, A. D. 189—, according to the provisions of the acts of Congress, relating to bankruptcy,

It is thereupon ordered, that said matter be referred to ——— ———, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said ——— ——— shall attend before said referee on the —— day of ——— at ———, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said ——— bankruptcy.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 18—.

{Seal of the court.}

——— ———,
Clerk.

[FORM No. 15.]

ORDER OF REFERENCE IN JUDGE'S ABSENCE.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
In Bankruptcy.

Whereas on the —— day of ———, A. D. 18—, a petition was filed to have ——— ———, of ———, in the county of ——— and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy*, on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said matter be referred to ——— ———, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said ——— ——— shall attend before said referee on the —— day of ———, A. D. 189—, at ———.

Witness my hand and the seal of the said court, at ———, in said district, on the —— day of ———, A. D. 189—.

{Seal of the court.}

——— ———,
Clerk.

[FORM No. 16.]

REFEREE'S OATH OF OFFICE.

I, ——— ———, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

———,
District Judge.

[FORM No. 17.]

BOND OF REFEREE.

Know all men by these presents: That we ——— ——— of ——— ——— as principal, and ——— ——— of ——— ——— and ——— ——— of ——— ———, as sureties are held and firmly bound to the United States of America in the sum of ——— dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ———, A. D. 189—.

The condition of this obligation is such that whereas the said ——— ———, has been on the —— day of ———, A. D. 18—, appointed by the Honorable ——— ———, judge of the District Court of the United States for the ——— district of ———, a referee in bankruptcy, in and for the county of ———, in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said ——— ——— shall well and faithfully discharge and perform all the duties pertaining to the said

office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed
in the presence of

——— ———, [L. S.]
——— ———, [L. S.]
——— ———, [L. S.]

Approved this —— day of ——— A. D. 189—.

——— ———,
District Judge.

[FORM No. 18.]

NOTICE OF FIRST MEETING OF CREDITORS.

In the District Court of the United States for the ——— District of ———. In Bankruptcy.

In the matter of
———
Bankrupt.
} In Bankruptcy.

To the creditors of ——— ———, of ———, in the county of ———, and district aforesaid, a bankrupt.

Notice is hereby given that on the —— day of ———, A. D. 18—, the said ——— ——— was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at ——— in ———, on the —— day of ———, A. D. 18—, at —— o'clock in the ———noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

——— ———,
Referee in Bankruptcy.

——— ——, 18—.

[FORM No. 19.]

LIST OF DEBTS PROVED AT FIRST MEETING.

In the District Court of the United States for the —— District of ——.

In the matter of

——

Bankrupt.

} In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—, before —— ——, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolls.	Cts.

—— ——,

Referee in bankruptcy.

[FORM No. 20.]

GENERAL LETTER OF ATTORNEY IN FACT WHEN CREDITOR IS NOT REPRESENTED BY ATTORNEY AT LAW.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
Bankrupt.
} In Bankruptcy.

To ——— ———:

——— ———,

I, ——— ———, of ———, in the county of ——— and State of ———, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, whenever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ———, A. D. 189—.

——— ———. [L. S.]

Signed, sealed and delivered in presence of—

——— ———.

Acknowledged before me this ——— day of ———, A. D. 189—.

——— ———,

[*Official character.*]

[FORM No. 21.]

SPECIAL LETTER OF ATTORNEY IN FACT.

In the matter of
——— ———
Bankrupt.
} In Bankruptcy.

To ——— ———,
——— ———:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at ———, on the —— day of ———, before ———, or any adjournment thereof, and then and there ——— for ——— and in ——— name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

——— ———, [L. S.]

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ———, A. D. 189—.

Signed, sealed, and delivered in presence of—

——— ———.

Acknowledged before me this —— day of ———, A. D. 189—.

——— ———,
[*Official character.*]

[FORM No. 22.]

APPOINTMENT OF TRUSTEE BY CREDITORS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before ——— ———, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint ——— ———, of ———, in the county of ——— and State of ———, to be the trustee— of the said bankrupt's estate and effects.

Signature of creditors.	Residences of the same.	Amount of debt.	
		Dolls.	Cts.

Ordered that the above appointment of trustee— be, and the same is hereby, approved.

———,
Referee in Bankruptcy.

[FORM No. 23.]

APPOINTMENT OF TRUSTEE BY REFEREE.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
Bankrupt.
} In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before ——— ———, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint ——— ———, of ———, in the county of ——— and State of ———, as trustee of the same.

——— ———,
Referee in Bankruptcy.

[FORM No. 24.]

NOTICE TO TRUSTEE OF HIS APPOINTMENT.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

To ——— ———, of ———, in the county of ———, and district aforesaid:

I hereby notify you that you were duly appointed trustee [*or* one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the —— day of ———, A. D. 18—, and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at ——— dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at ——— the —— day of ———, A. D. 18—.

——— ———,

Referee in Bankruptcy.

[FORM No. 25.]

BOND OF TRUSTEE.

Know all men by these presents: That we, ——— ———, of ———, as principal, and ——— ———, of ———, and ——— ———, of ———, as sureties, are held and firmly bound unto the United States of America in the sum of ——— dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ———, A. D. 189—.

The condition of this obligation is such, that whereas the above-named ——— ——— was, on the —— day of ———, A. D. 189—, appointed trustee in the case pending in bankruptcy in said court, wherein ——— ——— is the bankrupt, and he, the said ——— ———, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said ——— ———, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in
presence of—

——— ———
——— ———

——— ———, [SEAL.]
——— ———, [SEAL.]
——— ———, [SEAL.]

[FORM No. 26.]

ORDER APPROVING TRUSTEE'S BOND.

At a court of bankruptcy, held in and for the —— District of ———, at ———, ———, this —— day of ———, 189—.

Before ——— ———, referee in bankruptcy, in the District Court of the United States for the —— District of ———.

In the matter of

———

Bankrupt.

} In Bankruptcy.

It appearing to the Court ——— ———, of ———, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the creditors [*or* by order of the court], to wit, in the sum of ——— dollars, it is ordered that the said bond be, and the same is hereby, approved.

———,

Referee in Bankruptcy.

[FORM No. 27.]

ORDER THAT NO TRUSTEE BE APPOINTED.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

——— ———,
Referee in Bankruptcy.

[FORM No. 28.]

ORDER FOR EXAMINATION OF BANKRUPT.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, on the —— day of ———, A. D. 18—.

Upon the application of ——— ———, trustee of said bankrupt [*or* creditor of said bankrupt], it is ordered that said bankrupt attend before ——— ———, one of the referees in bankruptcy of this court, at ——— on the —— day of ———, at —— o'clock in the ———noon, to submit to examination under the acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

——— ———,
Referee in Bankruptcy.

[FORM No. 29.]

EXAMINATION OF BANKRUPT OR WITNESS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before ——— ———, one of the referees in bankruptcy of said court.

——— ———, of ———, in the county of ———, and State of ———, being duly sworn and examined at the time and place above mentioned, upon his oath says [*Here insert substance of examination of party.*]

——— ———,
Referee in Bankruptcy.

[FORM No. 30.]

SUMMONS TO WITNESS.

To ——— ———:

Whereas ——— ———, of ———, in the county of ———, and State of ———, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the ——— District of ———,

These are to require you, to whom this summons is directed, personally to be and appear before ——— ———, one of the referees in bankruptcy of the said court, at ———, on the —— day of ———, at — o'clock in the ——noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable ———, Judge of said court, and the seal thereof at ———, this —— day of ———, A. D. 189—.

——— ———,
Clerk.

RETURN OF SUMMONS TO WITNESS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

On this —— day of ———, A. D. 18—, before me came ——— ———, of ———, in the county of ——— and State of ———, and makes oath, and says that he did, on ———, the —— day of ———, A. D. 189—, personally serve ——— ———, of ———, in the county of ——— and State of ———, with a true copy of the summons hereto annexed, by delivering the same to him; and he further makes oath, and says that he is not interested in the proceeding in bankruptcy named in said summons.

——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———.

[FORM No. 31.]

PROOF OF UNSECURED DEBT.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, in said district of ———, and made oath, and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of ——— dollars; that the consideration of said debt is as follows:———

———

———;

that no part of said debt has been paid [except———

———] ;

that there are no no set-offs or counterclaims to the same [except

———] ;

and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

———,

Creditor.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

———,

[*Official character.*]

[FORM No. 32.]

PROOF OF SECURED DEBT.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
Bankrupt.
} In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, in said district of ———, and made oath, and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of ———dollars; that the consideration of said debt is as follows———; that no part of said debt has been paid [except———]; that there are no set-offs or counterclaims to the same [except ———]; and that the only securities held by this deponent for said debt are the following:———

———

———

——— ———,
Creditor.

Subscribed and sworn to before me this —— day of ———, A. D.—

——— ———,
[*Official character.*]

[FORM No. 33.]

PROOF OF DEBT DUE CORPORATION.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, and State of ———, and made oath and says that he is ——— of the ———, a corporation incorporated by and under the laws of the State of ———, and carrying on business at ———, in the county of ——— and State of———, and that he is duly authorized to make this proof, and says that the said ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of ——— dollars; that the consideration of said debt is as follows:

———

———;

that no part of said debt has been paid [except———]; that there are no set-offs or counter-claims to the same [except———]; and that the said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

———,

——— *of said Corporation.*

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

———,

[*Official character.*]

[FORM No. 34.]

PROOF OF DEBT BY PARTNERSHIP.

In the District Court of the United States for the ——— District of ———.

In the matter of ———— ———— *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, in said district of ———, and made oath, and says that he is one of the firm of ——— ———, consisting of himself and ——— ———, of ———, in the county of ———, and State of ———; that the said ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of ——— dollars; that the consideration of said debt is as follows:————————————————————————————; that no part of said debt has been paid [except————————]; that there are no set-offs or counterclaims to the same [except ————————]; and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

——— ———,
Creditor.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
[*Official character.*]

[FORM No. 35.]

PROOF OF DEBT BY AGENT OR ATTORNEY.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
Bankrupt.
} In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, and State of ———, attorney [*or* authorized agent] of ———, in the county of ———, and State of ———, and made oath and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said ——— ———, in the sum of ——— dollars; that the consideration of said debt is as follows: ———
———;
that no part of said debt has been paid [except ———
———];
and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use had or received any manner of security for said debt whatever. And this deponent further says, that this deposition cannnot be made by the claimant in person because ———
———
and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
[*Official character.*]

[FORM No. 36.]

PROOF OF SECURED DEBT BY AGENT.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, and State of ———, attorney [*or* authorized agent] of ———, in the county of ———, and State of ———, and made oath, and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said ——— ——— in the sum of ——— dollars; that the consideration of said debt is as follows:———

———

that no part of said debt has been paid [except ———

———];

that there are no set-offs or counterclaims to the same [except ———];

and that the only securities held by said ——— for said debt are the following ———

———;

and this deponent further says that this deposition cannot be made by the claimant in person because ———

———

and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.

——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,

[*Official character.*]

[FORM No. 37.]

AFFIDAVIT OF LOST BILL, OR NOTE.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
Bankrupt.
} In Bankruptcy.

On this —— day of ———, A. D. 18—, at ———, came ——— ———, of ———, in the county of ———, and State of ———, and makes oath and says that the bill of exchange [*or* note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit,———

———

———

and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said ——— ———, or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [*or* note], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

Bill or note above referred to.

Date.	Drawer or maker.	Acceptor.	Sum.

——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
[*Official character.*]

[FORM No. 38.]

ORDER REDUCING CLAIM.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—.

Upon the evidence submitted to this court upon the claim of ——— against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of ———, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of ———, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest*, with interest thereon from the —— day of ———, A. D. 18—].

———— ————,
Referee in Bankruptcy.

[FORM No. 39.]

ORDER EXPUNGING CLAIM.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—.

Upon the evidence submitted to the court upon the claim of ——— against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

———,
Referee in Bankruptcy.

[FORM No. 40.]

LIST OF CLAIMS AND DIVIDENDS TO BE RECORDED BY REFEREE AND BY HIM DELIVERED TO TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of

———

Bankrupt.

} In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—.

A list of debts proved and claimed under the bankruptcy of ——— ——— *with* ——— *dividend at the rate of* —— *per cent this day declared thereon by* ——— ———, *a referee in bankruptcy.*

No.	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dollars	Cents	Dollars	Cents

———, ———,

Referee in Bankruptcy.

[FORM No. 41.]

NOTICE OF DIVIDEND.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, on the —— day of ———, A. D. 18—.

To ——— ———,

Creditor of ——— ———, bankrupt:

I hereby inform you that you may, on application at my office, ———, on the —— day of ———, or on any day thereafter, between the hours of ——, receive a warrant for the ——— dividend due to you out of the above estate. If you cannot personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

——— ———,
Trustee.

CREDITOR'S LETTER TO TRUSTEE.

To ——— ———,

Trustee in bankruptcy of the estate of ——— ———, bankrupt:

Please deliver to ——— ——— the warrant for dividend payable out of the said estate to me.

——— ———,
Creditor.

[FORM No. 42.]

PETITION AND ORDER FOR SALE BY AUCTION OF REAL ESTATE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ———, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit [*here describe it and its estimated value*], should be sold by auction, in lots or parcels, and upon terms and conditions, as follows:———

———

Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this —— day of ———, A. D. 18—.

———,
Trustee.

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ———, A. D. 189—.

———,
Referee in Bankruptcy.

[FORM No. 43.]

PETITION AND ORDER FOR REDEMPTION OF PROPERTY FROM LIEN.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ——— ———, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit [*here describe the estate or property and its estimated value*], is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [*or, if the property be personal property,* has been pledged or deposited and is subject to a lien] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ———, being the amount of said lien, in order to redeem said property therefrom.

Dated this —— day of ———, A. D. 18—.

———,
Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of ———, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this —— day of ———, A. D. 189—.

———,
Referee in Bankruptcy.

[FORM No. 44.]

PETITION AND ORDER FOR SALE SUBJECT TO LIEN.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ——— ———, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit [*here describe the estate or property and its estimated value*], is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this —— day of ———, A. D. 189—.

——— ———,
Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or* at private sale], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ———, A. D. 189—.

——— ———,
Referee in Bankruptcy.

[FORM No. 45.]

PETITION AND ORDER FOR PRIVATE SALE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ——— ———, duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit, ———

———

———

it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit:———

———

———

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this —— day of ———, A. D. 189—.

——— ———,
Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ———, A. D. 189—

——— ———,
Referee in Bankruptcy.

[FORM No. 46.]

PETITION AND ORDER FOR SALE OF PERISHABLE PROPERTY.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ——— ———, the said bankrupt [*or*, a creditor, *or* the receiver, *or* the trustee of the said bankrupt's estate].

That a part of the said estate, to wit,———

———

———

now in ———, is perishable, and that there will be loss if the same is not sold immediately.

Wherefore, he prays the court to order that the same be sold immediately as aforesaid.

Dated this —— day of ———, A. D. 189—.

——— ———.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt, [*or* without notice to the creditors], now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto] I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this —— day of ———, A. D. 189—.

——— ———,

Referee in Bankruptcy.

[FORM No. 47.]

TRUSTEE'S REPORT OF EXEMPTED PROPERTY.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
Bankrupt.
} In Bankruptcy.

At ———, on the —— day of ———, 18—.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy.

General head.	Particular description.	Value.	
		Dolls.	Cts.
Military uniform, arms and equipments			
Property exempted by State laws .			

——— ———,
Trustee.

[FORM No. 48.]

TRUSTEE'S RETURN OF NO ASSETS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—.

On the day aforesaid, before me comes ——— ———, of ———, in the county of ———, and State of ———, and makes oath, and says that he, as trustee of the estate and effects of the above-named bankrupt , neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at ———, this —— day of ———, A. D. 18—.

———,
Referee in Bankruptcy.

[FORM NO. 49.]

ACCOUNT OF TRUSTEE.

DR. *The estate of* ——— ———, *bankrupt* , *in account with* ——— ———, *trustee.* CR.

		Dolls.	Cts.	Dolls.	Cts.			Dolls.	Cts.	Dolls.	Cts.

[FORM No. 50.]

OATH TO FINAL ACCOUNT OF TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

On this —— day of ———, A. D. 18—, before me comes ——— ———, of ———, in the county of ———, and State of ———, and makes oath, and says that he was, on the —— day of ———, A. D. 18—, appointed trustee of the estate and effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed containing —— sheets of paper, the first sheet whereof is marked with the letter —— [*reference may here also be made to any prioraccount filed by said trustee*] is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt , and that the payments purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts.

——— ———, *Trustee.*

Subscribed and sworn to before me at ———, in said —— District of ———, this —— day of ———, A. D. 18—.

———,
[*Official character.*]

[FORM No. 51.]

ORDER ALLOWING ACCOUNT AND DISCHARGING TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered, that the same be allowed, and that the said trustee be discharged of his trust.

——— ———,

Referee in Bankruptcy.

[FORM No. 52.]

PETITION FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

To the Honorable ——— ———,

Judge of the District Court for the —— District of ———:

The petition of ——— ———, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that ———, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following, to wit: [*Here set forth the particular cause or causes for which such removal is requested.*]

Wherefore ——— ——— pray that notice may be served upon said ———, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

——— ———.

[FORM No. 53.]

NOTICE OF PETITION FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, on the —— day of ———, A. D. 18—.

To ——— ———,

Trustee of the estate of ——— ———, bankrupt:

You are hereby notified to appear before this court, at ———, on the —— day of ———, A. D. 18—, at — o'clock —. M., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of ——— ———, one of the creditors of said bankrupt, filed in this court on the —— day of ———, A. D. 18—, in which it is alleged [*here insert the allegation of the petition*].

——— ———, *Clerk.*

[FORM No. 54.]

ORDER FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Whereas ——— ———, of ———, did, on the —— day of ———, A. D. 18—, present his petition to this court, praying that for the reasons therein set forth, ——— ———, the trustee of the estate of said ——— ———, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said ——— ——— and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said ——— ——— be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said ——— ———, trustee [*or*, out of the estate of the said ——— ———, subject to prior charges].

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 18—.

——— ———,
Clerk.

{Seal of the court.}

[FORM No. 55.]

ORDER FOR CHOICE OF NEW TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, on the —— day of ———, A. D. 18—.

Whereas by reason of the removal [*or* the death *or* resignation] of ——— ———, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee,

It is ordered, that a meeting of the creditors of said bankrupt be held at ———, in ———, in said district, on the —— day of ———, A. D. 18—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

———, *Referee in Bankruptcy.*

[FORM No. 56.]

CERTIFICATE BY REFEREE TO JUDGE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

I, ——— ———, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at ———, the —— day of ———, A. D. 18—.

———— ————,
Referee in Bankruptcy.

[Form No. 57.]

Bankrupt's Petition for Discharge.

In the matter of ——————— *Bankrupt.*	In Bankruptcy.

To the Honorable ——— ———,
Judge of the District Court of the United States
for the District of ———.

——— ———, of ———, in the county of ———, and State of ———, in said district, respectfully represents that on the —— day of ———, last past, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this —— day of ———, A. D. 189—.

——— ———, *Bankrupt.*

Order of Notice Thereon.

District of ———, *ss:*

On this —— day of ———, A. D. 189—, on reading the foregoing petition, it is —

Ordered by the court, that a hearing be had upon the same on the —— day of ———, A. D. 189—, before said court, at ———, in said district, at —— o'clock in the ——— noon; and that notice thereof be published in ——— ———, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 189—.

———— ————,

{Seal of the court.} *Clerk.*

—— hereby depose, on oath, that the foregoing order was published in the ——— ——— on the following ——— days, viz.:

On the —— day of ——— and on the —— day of ———, in the year 189—.

———— ————.

District of ———.

———— ————, 189—.

Personally appeared ——— ———, and made oath that the foregoing statement by him subscribed is true.

Before me,

———— ————.

[*Official character.*]

I hereby certify that I have on this —— day of ———, A. D. 189—, sent by mail copies of the above order, as therein directed.

———— ————,

Clerk.

[Form No. 58.]

SPECIFICATION OF GROUNDS OF OPPOSITION TO BANKRUPT'S DISCHARGE.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
Bankrupt.
} In Bankruptcy.

——— ———, of ———, in the county of ———, and State of ———, a party interested in the estate of said ——— ———, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [*Here specify the grounds of opposition.*]

——— ———, *Creditor.*

[Form No. 59.]

DISCHARGE OF BANKRUPT.

District Court of the United States,

——— District of ———.

Whereas, ——— ——— of ——— in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said ——— ——— be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the —— day of ———, A. D. 189—, on which day the petition for adjudication was filed ——— him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable ——— ———, judge of said district court, and the seal thereof this —— day of ———, A. D. 189—.

——— ———,
Clerk.

{Seal of the court.}

[FORM No. 60.]

PETITION FOR MEETING TO CONSIDER COMPOSITION.

District Court of the United States for the ——— District of ———.

——————————
——————————
Bankrupt.
} In Bankruptcy.

To the Honorable ——— ———, Judge of the District Court of the United States for the —— District of ———:

The above-named bankrupt respectfully represent that a composition of ——— per cent upon all unsecured debts, not entitled to a priority ——— ——— in satisfaction of —— debts has been proposed by —— to —— creditors, as provided by the acts of Congress relating to bankruptcy, and —— verily believe that the said composition will be accepted by a majority in number and in value of ——— creditors whose claims are allowed.

Wherefore, he pray that a meeting of ——— creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

——— ———,
Bankrupt.

[FORM No. 61.]

APPLICATION FOR CONFIRMATION OF COMPOSITION.

In the District Court of the United States, for the ——— District of ———.

In the matter of ———— ———— *Bankrupt.*	In Bankruptcy.

To the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———.

At ———, in said district, on the —— day of ———, A. D. 189—, now comes ——— ———, the above-named bankrupt, and respectfully represents to the court that, after he had been examined in open court [*or* at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of ——— dollars, has been deposited, subject to the order of the judge, in the ——— National Bank, of ———, a designated depository of money in bankruptcy cases.

Wherefore the said ——— ——— respectfully asks that the said composition may be confirmed by the court.

———— ————, *Bankrupt.*

[FORM No. 62.]

ORDER CONFIRMING COMPOSITION.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
} In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, this —— day of ———, A. D. 189—.

{Seal of the court.} ——— ———, *Clerk.*

[Form No. 63.]

Order of Distribution on Composition.

United States of America:
In the District Court of the United States for the ——— District of ———.

In the matter of
———
Bankrupt.
} In Bankruptcy.

The composition offered by the above-named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, this —— day of ———, A. D. 189—.

{Seal of the court.}

——— ———, *Clerk.*

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